TY 2020-2021
Legal Issues
Student Guide

Municipal Police Training Committee

Legal Issues TY 2020-2021
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This document is intended to serve as a training guide for legal instructors to review new case law and legislation that has been issued from the controlling courts in Massachusetts, the Supreme Judicial Court and the Massachusetts Appeals Court over the course of the year. Some Supreme Court decisions are included in this curriculum. While this curriculum examines the impact of new cases or law by revisiting some past cases, it is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor. Additionally, please remember that many cases are fact specific and contain variations that make it difficult for the Courts to establish bright line rules for policing. Please direct questions and comments to:

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Chapter 1
MOTOR VEHICLE LAW

An act requiring the hands-free use of mobile telephones while driving G.L. c. 90, § 13B.

1. **Definition:** "Hands-free mode" is the operation of a mobile electronic device by which the operator engages in a voice communication or receives audio without touching or holding the device, provided that a mobile device may require a single tap or swipe to activate, deactivate or initiate the hands-free mode feature.

2. **What does the bill prohibit? (G.L. c. 90, § 13B)**
   - No operator of a motor vehicle shall use a mobile electronic device unless the device is being used in hands-free mode.
   - No operator of a motor vehicle shall read or view text, images, or video displayed on a mobile electronic device; **provided**:
     - An operator may view a map generated by a navigation system or application on a mobile electronic device that is mounted on or affixed to a vehicle's windshield, dashboard or center console in a manner that does not impede the operation of the motor vehicle.
   - No operator of a motor vehicle shall hold a mobile electronic device.
     - **NOTE:** A driver is **not** considered to be operating a motor vehicle if the vehicle is stationary and not located on a public way where motor vehicles and bicycles travel.

3. **Emergency Provision**. The law does permit the use of an electronic device in response to an emergency. The bill designates the following situations as emergencies:
   a. vehicle was disabled
   b. medical assistance or attention is required
   c. police, fire or other emergency services are needed for the personal safety of the operator, passenger or to ensure the safety of the public
   d. a disabled vehicle or an accident was present on a roadway.

   - **NOTE:** Public safety personnel or emergency first responders can use a device while operating an emergency service vehicle and are engaged in the performance of their duties.

4. **Penalties:**

   1st offense: $100 fine.
   2nd offense: $250 fine and will have to complete a distracted driving program offered by the RMV.
   3rd offense or subsequent offenses: $500 fine and become surchargeable.

- ❖ **NOTE:** The above citations do not require forfeiture of the driver's phone nor does it authorize police to seize the phone.

5. Data Collection (G. L. C. 90, § 63): The Registry of Motor Vehicles shall collect the following data from any Massachusetts Uniform Citation:

- age, race and gender of individuals who receive a warning or citation;
- traffic infraction;
- date and time of the offense and the municipality in which the offense was committed;
- whether there was a search initiated as a result of the stop;
- whether the stop resulted in a warning, citation or arrest.

Data collected will only be used for statistical purposes and should not identify the individual or the officer involved in the underlying stop.

6. Executive Office of Public Safety and Security:

Process and Procedure

The Secretary of Public Safety and Security shall a standardized process and develop procedures to assist law enforcement in collecting this data. Failure to collect the data will not impact the validity of the stop.

The Secretary of Public Safety and Security shall transmit the data collected by the Registry of Motor Vehicles to a university, non-profit organization or institution, whether private or public with experience in analyzing data and reporting its findings. The Secretary of Public Safety and Security will publish a summary of the data annually and provide it to the Attorney General, the Department of State Police, the Massachusetts Chiefs of Police Association and the clerks of the House of Representatives and Senate. If the summary data suggests that a law enforcement agency has engaged in gender or racial profiling, then the law enforcement agency will be required to collect data for one (1) year. The data shall include the information already collected from the citation as well as the reasons for the stop, even if the operator did not receive a warning, citation or arrest. The bill would also mandate that the law enforcement agency complete bias training using best practices.

Safety and Security

The data collected shall be stored in a secured system in a cryptographically encrypted form. The data shall only be provided upon the execution of a written confidentiality agreement with the Secretary of Public Safety and Security that is authorized to protect the privacy and prohibit further distribution of the data. Unencrypted data shall not be accessed, copied, or communicated without express written approval of the secretary. Additionally, any process data can only be collected for aggregate information and cannot reveal the identity of the law enforcement officer or the identity of the person.

Annual Report

The Secretary of Public Safety and Security shall publish a summary of the annual data.

The report shall include the information listed below:

- containing aggregate numbers,
- listed by municipality and law enforcement agency,

- for the information categories identified in subsection (a);
- provided, that data concerning age shall be aggregated into categories for persons

    - aged 29 and younger, and
    - aged 30 and older;

- and provided further, that data concerning time of day shall be aggregated into categories for offenses committed:

    - from 12:01 am to 6:00 am,
    - from 6:01 am to 12:00 pm,
    - from 12:01 pm to 6:00 pm, and
    - from 6:01 pm to 12:00 am.

Public Hearings

The Secretary of Public Safety and Security will make the information available to the public online. Additionally, the Secretary of Public Safety and Security shall hold no less than three (3) public hearings thirty days after the report is released. The hearings shall take place in different regions of the state to present the annual analysis and report and to accept public testimony regarding such report. The public shall receive notice of the public hearing, no less than fourteen (14) days before the hearing. The dates of the public hearings will be posted on the Executive Office of Public Safety and Security's website and any official social media accounts and by providing written notice to the Joint Committee on Public Safety and Security, the Joint Committee on the Judiciary, and the clerks of the House of Representatives and the Senate.

7. Additional Training for Distracted Driving:

The RMV along with the Highway Safety Division, the Department of Elementary and Secondary Education (DESE), the Department of Higher Education and Municipal Chiefs of Police Association (MCOPA) shall develop and implement an annual public awareness campaign for junior and adult operators regarding the dangers and consequences of distracted driving.

The training will provide information on the restrictions of mobile telephone and mobile electronic device use while operating a motor vehicle and information on the fines and punishments that may be imposed for violations of said chapter 90 and bicycle safety. All driver's manuals that the RMV develops shall include information on the hazards of distracted driving in each revised publication.

8. Study for Collecting Accurate Data (G.L. c. 90, § 63):

The Secretary of Public Safety and Security shall investigate and study alternative methods for collecting more accurate data. The study shall examine the feasibility of expanding the data collected:

- including expansion of the data collection to include the race and gender of each individual subject to traffic stops,
- searches resulting from a traffic stop or frisks resulting from a traffic stop,
- whether or not a Massachusetts Uniform Citation was issued. (e.g., Verbal Warnings)

	Changes
What is considered a violation of hands-free mode?	• Operator of a motor vehicle cannot use mobile electronic device unless the device is being used in hands-free mode. • Operator of a motor vehicle cannot hold a mobile electronic device. • Operator of a motor vehicle cannot read or view text, images, or video displayed on a mobile electronic device. **Exception:** Operator can use GPS application on a mobile electronic device as long as it is mounted on or affixed to a vehicle's windshield, dashboard or center console.
Penalties **(G.L. c. 90, § 13B)**	• 1st Offense: $100 fine; • 2nd Offense: $250 fine and distracted driving training through RMV; • 3rd Offense or subsequent: $500 fine and distracted driving training through RMV. This offense is surchargeable.
Emergency Provision	An operator using electronic device during emergency is permitted if the following occurs: • Disabled vehicle; • Seeking medical attention for operator or driver; • Disabled vehicle or accident on public way.
Junior Operators **(G.L. c. 90, § 8M)**	• No person under the age of 18 shall hold in their hand or use a mobile telephone, hands-free mobile telephone or mobile electronic device while operating a motor vehicle on any public way. A junior operator is not considered operating at motor vehicle that is stationary and not located in a part of the public way where a motor vehicle or bicycle travel. **Penalties**: Same fines as adults. **License Suspension for Junior Operator License** • 1st Offense: 60 day loss of license and required attitudinal retraining program; • 2nd Offense: 180 day loss of license; • 3rd Offense: 1 year loss of license. ❖ **NOTE:** The bill added language to the law pertaining junior operators using hands-free electronic devices while operating a motor vehicle.
Data Required to be collected	The bill requires the following data be collected: • age, race and gender of individuals who receive a warning or citation; • traffic infraction; • date and time of the offense and the municipality in which the offense was committed; • whether there was a search initiated as a result of the stop; • whether the stop resulted in a warning, citation or arrest.
Executive Office of Public Safety and Security	• Standardize a process and develop a procedure for law enforcement to collect data; • Publish a summary of annual data collected; • Maintain Secure System for data that is collected; • Must have no less than three public hearings in different parts of the state to present annual analysis and report; • Investigate and Study Alternative Methods of Collecting Data;

Recent OUI Updates

A. Public Way

The Appeals Court affirmed a conviction for OUI and negligent operation after determining that a hotel parking lot where the public had access to the hotel's restaurant, bar, retail shop, and beach qualified as a public way!

Commonwealth v. Konstantinos Tsonis, 96 Mass. App. Ct. 214 (2019): On August 3, 2017, the defendant drove his truck into the parking lot of the Sea Crest Beach Motel. The Sea Crest Beach Hotel is a resort in North Falmouth that includes a hotel, a restaurant, a bar, a retail shop, and a public beach. The restaurant, bar, shop, and beach are open to the public. Anyone accessing the parking lot must pass by a gatehouse with a sign that says, "GUEST CHECK IN." There is only one entrance and exit. Guests not checking into the hotel usually drive past the gatehouse without stopping and park in the lot. There is a gatehouse attendant working primarily on the weekends during the day.

On the date of the incident, an employee, noticed a driving slowly as it entered the parking lot. The defendant, Konstantinos Tsonis, was driving the vehicle and became aggressive when the employee asked if he needed assistance. After the exchange with the employee, the defendant drove away and over the curb. The employee was concerned that the truck was disturbing guests because it was extremely noisy and appeared to be shining its high beam lights into one of the hotel buildings where guests were staying. The employee was concerned for the safety of the guests because the defendant continued to drive around the parking lot at a very slow speed. The employee attempted to speak to the defendant for a second time. This time the defendant stopped the truck, threw open the door to the truck, and "lunged" towards the employee with "clenched fists," screaming and making incoherent threats. The employee retreated to the hotel lobby and called the police.

When police arrived, the defendant was still driving around the parking lot, nearly striking parked vehicles. The officer turned on his emergency blue lights to stop the vehicle. When the officer approached the driver's side of the car on foot, the defendant, through the open driver's side window, said, "Really?" When the officer requested the defendant's license and registration and asked what the defendant was doing there, the defendant continued to repeat, "Really? Really?" The defendant had difficulty stepping out of the vehicle and was unsteady on his feet. He struggled to maintain his balance and he swayed back and forth while speaking. The defendant smelled of alcohol and his eyes were glassy and bloodshot. The defendant denied having consumed alcohol that night. The defendant's response to the officer's questions about why he was in the parking lot was, "Really?" The defendant was not a hotel guest and he could not explain why he was there. The officer arrested the defendant and placed him in his cruiser. At the Falmouth Police station, the officer helped the defendant to get out of the cruiser and the defendant leaned on the officer for balance while in the booking room. During booking, the defendant stated that he believed that he was at the Bourne Police station, where he said his sister worked. The defendant continued to sway back and forth and lean on the officer for balance throughout the booking process.

The defendant was convicted after a jury-waived trial for operating under the influence of liquor, G.L. c. 90, § 24 (1) (a) (1), and negligent operation of a motor vehicle, G.L. c. 90, § 24 (2) (a).

Conclusion: The Appeals Court held that the hotel parking lot qualified as a public way because the public had access to the parking lot to visit the restaurant, bar, retail shop, and beach, and the presence of the gatehouse did not negate the public's access.

1st Issue: Was the Parking Lot a Public Way or Place?

A public way or place is defined as "any way or any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees." G.L. c. 90, § 24 (1) (a) (1); G. L. c. 90, § 24 (2) (a). Here the evidence demonstrated that the public had access to the parking lot of the Sea Crest Beach Hotel even if they were not guests of the hotel. Although there was a gatehouse at the entrance of the parking lot, its presence did not negate the public nature of the parking lot. Members of the public routinely were permitted to drive by the gatehouse and park in the parking lot even when there was an attendant working at the gatehouse. Often there are signs restricting parking to hotel guests and beach club members, but there were none on display the evening of the incident. A public place is not solely a place the public is allowed to park, but rather a place that the public is allowed to travel.

This case is similar to ***Commonwealth v. Brown***, 51 Mass. App. Ct. 702 (2001), where the Appeals Court determined that the roadways through the grounds of an Air Force base located on the Massachusetts Military Reservation were public ways because "a considerable number of persons [were] authorized to, and routinely [did]," travel on the roadways. Such travelers included military personnel and their families, visitors to a national cemetery located on the property, attendees and staff of a public school located on the reservation, and those using a little league field located there. ***Id***. at 707. In ***Brown***, the unattended gatehouses at the entrance to the Air Force base had signs indicating that the area was restricted to "authorized personnel only." ***Id***. at 709. However, the signs restricting access did not change the outcome because the roads in the Air Force base remained public ways since a number of persons were authorized to travel on the roads. ***Id.*** at 712. In the present case, members of the public wishing to visit the restaurant, bar, shop, or beach located at the Sea Crest Hotel had similar access to the parking lot. Moreover, the signs placed during the day on busy weekends restricted only parking, not access. There was sufficient evidence to establish that the parking lot in which the defendant drove was a public place.

2nd Issue: Was there sufficient evidence to establish impairment?

The Appeals Court found that the facts establish the defendant was impaired. The defendant exhibited physical signs of intoxication and behaved erratically. The employee described the encounter he had with the defendant where he was aggressive defendant's driving slowly around the parking lot in a suspicious manner. When the employee confronted the defendant, he observed that the defendant had a glazed look on his face and appeared aggressive. The defendant lunged towards the employee with clenched fists, screaming and making incoherent threats. See ***Commonwealth v. Jewett***, 471 Mass. 624 (2015) (defendant's belligerent behavior such as fighting with police officer was evidence of intoxication).

The officer also observed the defendant driving around the parking lot over marked parking rows, and nearly striking a couple of parked vehicles. The defendant was unresponsive to the police officer's questions and "kept repeating, 'Really? Really?'" The officer observed that the defendant's eyes were glassy and bloodshot and smelled an odor of alcohol emanating from the defendant. See ***Commonwealth v. Rarick***, 87 Mass. App. Ct. 349 (2015) (officers' observations that defendant's eyes were glassy and bloodshot and that defendant had strong odor of alcohol was evidence of impairment). Moreover, the defendant appeared to be unsteady on his feet and struggled to maintain his balance. At various times during the booking process, the defendant was swaying and held onto the officer for balance. See ***Commonwealth v. Lavendier,*** 79 Mass. App. Ct. 501 (2011) (defendant's "slurred speech, belligerent demeanor, strong odor of alcohol, poor balance, and glassy, bloodshot eyes" were all evidence of intoxication). This evidence was sufficient to establish evidence of impairment.

3rd Issue: Was there sufficient evidence to establish negligent operation?

Lastly, the Appeals Court upheld the conviction for negligent operation. To prove negligent operation, "the Commonwealth must prove that the defendant (1) operated a motor vehicle (2) upon a public way (3) negligently so that the lives or safety of the public might be endangered." ***Commonwealth v. Ross,*** 92 Mass. App. Ct. 377 (2017). Here, the defendant's erratic driving and near collision with parked vehicles suggest that the lives or safety of the public might be endangered. See ***Commonwealth v. Daley***, 66 Mass. App. Ct. 254, 256 (2006) (driving over fog line multiple times, straddling breakdown lane, and narrowly missing hitting road work sign was evidence of negligent operation). The defendant travelled slowly around the parking lot and drove over a curb, nearly hitting parked cars. The defendant failed to produce his license and registration and did not respond to the officer's questions about why he was in the parking lot. See ***Commonwealth v. Sousa***, 88 Mass. App. Ct. 47, 51 (2015) (sufficient evidence that defendant's conduct might have endangered public where defendant's vehicle rolled through stop sign, abruptly stopped and started, and defendant appeared asleep behind wheel and did not comply with police officer's commands). All of these factors establish that the defendant was negligently operating a motor vehicle.

B. Impairment

The Appeals Court held that there was an abandoned motor vehicle with extensive damage along with the injuries to the defendant and his wet clothes were significant factors in proving that the defendant operating a motor vehicle while impaired.

Commonwealth v. Stephen Proia, Mass. App. Ct. No. 19-P-602, (2020):

On January 11, 2015, in the early evening, Trooper Christopher Booth, responded to an accident on Route 495 in Franklin. He observed a sport utility vehicle (SUV) with extensive damage, and a family of six standing on the side of the highway. The driver of the SUV, his fiancée, and his children were driving home to Connecticut, southbound on Route 495, when a black sedan approached his SUV from behind. The driver estimated that the sedan was driving in excess of one hundred miles per hour. The black sedan struck the rear of the SUV and the two vehicles became attached. After a few seconds, the vehicles separated and the black sedan veered into the center median of Route 495. The driver of the SUV regained control and pulled off the road onto the ramp for exit sixteen. There was a loud screeching sound and sparks radiating from the black sedan as it left the highway.

Franklin police located a black Mercedes sedan with extensive front end damage, parked on the side of a road, in a snowbank and partially blocking the travel lane. There was no operator, nor anyone else, present at the scene. The front airbags had deployed and there were "red brown stains" on the driver's side airbag, consistent with blood. When Trooper Booth arrived on scene, he determined that the black Mercedes was registered to the defendant. The defendant's driver's license was on the floor and Franklin police officers had found the defendant about one half mile from the abandoned Mercedes, in the parking lot of Cole's Tavern in Franklin. Trooper Booth met the Franklin police and the defendant at the tavern. The defendant had a laceration on his head, lacerations to his hands, "red brown stains" on his hands and pants, and soaking wet pants and shoes, consistent with having walked through snow. The officers detected a strong odor of alcohol on the defendant's breath, and noticed his eyes were bloodshot and his speech was slurred. The defendant identified himself, but had no identification on him. He was disoriented and appeared "unbalanced" and he "swayed side to side." The defendant denied driving the vehicle and he said that a friend had dropped him off at the tavern.

The defendant was convicted after a jury trial of operating under the influence of alcohol, third offense, G. L. c. 90, § 24 (1) (a) (1); leaving the scene after causing property damage, G. L. c. 90, § 24 (2) (a); and negligent 2 operation of a motor vehicle, G. L. c. 90, § 24 (2) (a). He appealed his conviction and argued there was insufficient evidence to prove he operated the Mercedes and that he was impaired.

Conclusion: The Appeals Court affirmed the convictions the defendant's convictions and held there was sufficient evidence to support a finding that the defendant operated the motor vehicle and was impaired.

There was sufficient evidence to show the defendant operated the Mercedes on the night in question. The vehicle was registered to the defendant and it was clearly involved in a serious accident. The vehicle was abandoned near a snowbank, was severely damaged with the defendant's driver's license on the floor, had deployed airbags, and blood stains on the driver's side airbag. Additionally, the defendant was found outside of a nearby tavern less than minutes after police responded to the accident. The defendant's pants and shoes were wet as though he had been walking through snow, and he had lacerations on his hands and head consistent with having been in an accident and that might have left bloodstains on the driver's side airbag that deployed in a car that he was driving, as were found in the Mercedes. He had no identification on him. Although circumstantial, this evidence suffices to support the defendant operated the vehicle.

Here, the defendant was intoxicated when found outside the tavern shortly after the accident. The way in which the Mercedes was left, halfway in a snowbank and sticking out into the travel lane of a road, indeed the way it was operated on Route 495, when combined with the evidence of intoxication further supports an inference that might reasonably have been drawn by the jurors, that the defendant was impaired by reason of his consumption of alcohol in his ability to operate the Mercedes at the time he drove it.

Validity of Consent for a Blood Draw

1. **A blood draw requires a warrant or exigent circumstances** excusing the failure to obtain a warrant.

2. **When there are exigent circumstances** so that the Fourth Amendment poses no bar to a compelled blood test, a right to refuse is provided by statute, and **blood may be drawn only with the individual's consent**.

Commonwealth v. Dennis: 96 Mass. App. Ct. 528 (2019): Officers Melissa Dion and Andrew Roxo, responded to a car crash and found the defendant, Brian Dennis unconscious in his vehicle. The vehicle appeared to have crashed into a utility pole and responder had to extract the defendant from his car. The defendant regained limited ability to respond yes or no to questions and admitted he had something to drink. Officer Dion observed a number of empty alcohol containers in the defendant's car and she detected an odor of alcohol on the defendant. The defendant told police he had no preexisting medical conditions. The defendant was taken by ambulance to the hospital. The defendant was placed under arrest for operating while under the influence of alcohol, and Officer Dion administered Miranda warnings to the defendant while in the ambulance. Officer Dion re-administered Miranda warnings to the defendant while inside the emergency room. The defendant said he was drinking and he was guilty.

Officer Dion attempted to receive the defendant's consent for a blood draw. However, a nurse delayed the process and said that he was not medically cleared. Around 3:30 A.M., when the defendant was medically cleared for a conversation about obtaining a blood draw, his demeanor had materially changed

from his initial one-word answers, Officer Dion read to the defendant at the hospital a "statutory rights and consent form." That form states, as relevant here:

> **"I am requesting that you submit to a chemical test to determine your blood alcohol concentration. If you refuse this test, your license or right to operate in Massachusetts shall be suspended for at least a period of up to 180 days or up to life for such refusal. The suspension if you take the test and fail it is 30 days. If you decide to take the test and complete it, you will have the right to a comparison blood test within a reasonable period of time at your own expense. The results of this comparison test can be used to restore your license or right to operate at a court hearing within 10 days. Refusal or failure to consent to take the test is a violation of the Implied Consent Law, and will result in your right to operate a motor vehicle being suspended."**

The part of the form that was applicable to the defendant did not specify that the "chemical test" will be on blood, as opposed to breath, urine, or anything else, nor does it state that blood will be drawn. The judge found that the defendant stated that he understood the form, that he signed the form, and that "blood was taken from the defendant after the form was signed." The defendant filed a motion to suppress and it was denied. The judge concluded that the defendant did not refuse to have his blood drawn. The defendant filed a motion for reconsideration and he preserved his appeal rights after the motion was denied.

Conclusion: The SJC held that the defendant's consent was not valid and therefore the blood was not admissible.

1st Issue: Do you need actual consent for a blood draw?

Piercing one's skin with a needle to draw blood, and the testing of that blood, constitutes a full-blown seizure and search for purposes of the Fourth Amendment to the United States Constitution. ***Commonwealth v. Angivoni,*** 383 Mass. 30, 32 (1981). In the absence of probable cause and a warrant (or exigent circumstances excusing the failure to obtain that warrant), police cannot draw an individual's blood without consent. The consent must be "voluntary" under the Federal Fourth Amendment standard. The Commonwealth must show the consent was unfettered, without coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority" ***Commonwealth v. Ortiz***, 478 Mass. 820, 823 (2018). However, if there is an exigency, blood can be drawn without a warrant. If there is probable cause to believe an individual has been driving while under the influence of intoxicating liquor, and there are exigent circumstances excusing the warrant requirement, the Federal Constitution imposes no requirement of consent before blood may be drawn from an individual, even if the police have no warrant. **Massachusetts requires by statute that consent must be obtained for a blood draw even when there is probable cause and exigent circumstances**. In ***Commonwealth v. Davidson*** 27 Mass. App. Ct. 846 (1989), where a blood draw by police is permitted under the Fourth Amendment, "[t]he right of refusal [a defendant] does stems from the statute, which requires that a test not be conducted without his consent." However it is clear that the [G. L. c. 111, § 51] G. L. c. 90, § 24 (1) (f) (1), actual consent must be provided before police may undertake a blood draw.

2nd Issue: Does testing blood for alcohol qualify as an exigent circumstance?

In ***Schmerber v. California***, 384 U.S. 757 (1966), police had probable cause to believe that an individual involved in a one-car accident had been operating the vehicle while under the influence of liquor.

The Supreme Court held that no warrant was necessary because of exigent circumstances. See ***Id.*** at 770. The Supreme Court concluded that the police officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence, ***Preston v. United States,*** 376 U.S. 364, (1964). The percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.

The Massachusetts Appeals Court held in ***Davidson*** "where there is probable cause to believe that a defendant has been operating a vehicle while under the influence of intoxicating liquor, the defendant has no constitutional right to refuse a blood test or a breathalyzer test." ***Davidson***, 27 Mass. App. Ct. at 848. Although not stated explicitly, this holding necessarily reflected the Court's conclusion that ***Schmerber*** stands for the proposition that there is always exigency when there is probable cause to believe an individual has been operating while under the influence of intoxicating liquor, presumably because of the predictable dissipation of blood alcohol. However, recent United States Supreme Court decisions make clear that the holding in ***Davidson*** on the scope of the exigent circumstances exception is no longer good law. Six years ago, in ***Missouri v. McNeel***y, 569 U.S. 141, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013), the Supreme Court clarified that the scope of the exigent circumstances exception to the warrant requirement articulated in ***Schmerber*** is not as broad as we concluded it was in ***Davidson***.

The ***McNeely*** court held that the exigent circumstances that justify dispensing with a warrant are not invariably present when there is probable cause in drunk driving cases, even though blood alcohol will predictably dissipate. In ***McNeely***, the Court held that an officer must obtain a warrant unless, upon an examination of the "totality of the circumstances," it is clear that evidence could be destroyed if the officer had to apply for a warrant. A warrant is required before blood may be drawn from an individual with respect to whom there is probable cause to believe he or she has been operating while under the influence of intoxicating liquor. ***McNeely***, *supra* at 150, 133. The Court rejected the contention that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because [blood alcohol content] evidence is inherently evanescent." ***McNeely,*** *supra* at 151. The Court held that, "in those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***Id***. at 152, 133. When there is neither a warrant nor exigent circumstances, blood may be drawn only with consent that meets the Federal constitutional standard of actual, voluntary consent under the Fourth Amendment, not the lower standard of consent required under our statute.

Here the Commonwealth had probable cause to believe the defendant was operating while under the influence of intoxicating liquor, but lacked a warrant. There was no argument that there were exigent circumstances. Under the Federal Constitution, the defendant's blood could be drawn only with his consent, and the question before us is whether the Commonwealth has met its burden of demonstrating that the defendant gave actual, voluntary consent under the Federal constitutional standard. See ***Birchfield***, 136 S. Ct. at 2186. The defendant argues that the language included on the statutory rights and consent form related to a "chemical test" is ambiguous, his agreement to what was requested is insufficient to meet the Commonwealth's burden of proving voluntary consent under this standard. The motion judge did not analyze the case in this way because he concluded, incorrectly, that the defendant had no constitutional right to refuse a blood test, and therefore examined only the less stringent "traditional indicia" of consent set forth in ***Davidson***, under which the defendant's failure to object has greater significance than it does under the constitutional test.

The consent form did not specify that the defendant was consenting to a blood test. It stated a "chemical test." The closest it came was stating, "It is not your option which type of chemical test to take." But without some enumeration of the types that may be given, that is inadequate to inform the defendant that he is being asked to allow a blood test, a "physical intrusion beneath his skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy." ***McNeely***, 569 U.S. at 148. Indeed, at one point the form provides, "If you decide to take the test and complete it, you will have a comparison blood test within a reasonable period of time at your own expense," which might be understood to be contrasting a "blood test" with the kind of "chemical test" for which the form was seeking consent. "The ambiguity of words and actions of the officers and occupants makes it difficult to discern whether there was actual consent in this case." To the extent the defendant's conduct in not objecting at the time of the blood draw is relevant, the temporal proximity between the signature and the blood draw is not clear from the evidence, nor is there any evidence the nurse who took the blood indicated in any way that it was for the police, rather than for medical purposes.

Alcohol Dissipation Does Not Create an Exigency!

Missouri v McNeely**,** 133 S. Ct. 1552 (April 2013): The Supreme Court held that police should get a warrant when testing for alcohol in the bloodstream. The natural dissipation of alcohol in the bloodstream in drunk driving cases does not create an exigent circumstance and therefore fails to justify conducting a blood test without a warrant.

Birchfield v. North Dakota, 136 S. Ct. 2160, (2016): The Supreme Court consolidated three cases. Two of the cases occurred in North Dakota while the third incident happened in Minnesota. The primary issue addressed whether requiring a suspect to take a blood test without a warrant violated the Fourth Amendment. States vary with the penalties for operating under the influence of alcohol. Despite these differences, all states have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Over time, however, states have toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to reject testing, some States, including North Dakota and Minnesota, now make it a crime to refuse to undergo testing.

Conclusion: The Court held that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving, but not warrantless blood tests.

The Court determined that blood and breath tests are considered searches under the Fourth Amendment. Since both are regarded as searches, the Supreme Court analyzed whether to treat breath and blood tests differently. After examining the privacy interests of the blood tests and breath tests, the Court found that blood tests are more intrusive. Breath tests do not "implicate significant privacy concerns." ***Skinner***, 489 U. S., at 626. The physical intrusion is almost negligible. The tests "do not require piercing the skin" and entail "a minimum of inconvenience." ***Id.,*** at 625. Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek, ***Maryland* v. *King***, 569 U. S., or scraping underneath a suspect's fingernails, ***Cupp* v. *Murphy*****,** 412 U. S. 291. Breath tests, unlike DNA samples, also

yield only a BAC reading and leave no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest.

Unlike breath tests, blood tests do implicate privacy concerns because they do not "require piercing the skin" and extract a part of the subject's body, ***Skinner, supra*** at 625, and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested.

Lastly, the Court examined whether forcing a person to take a blood tests violated the Fourth Amendment. The Court held that it did violate the Fourth Amendment even though it understood that harsher penalties were imposed to combat drunk driving. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. The Court did not address refusals under state laws where the penalty was civil in nature.

Open Container for Alcohol is Decriminalized

Commonwealth v. Mansur, 484 Mass. 172 (2020) The defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor (OUI), in violation of G. L. c. 90, § 24 (1) (a) (1); possessing an open container of alcohol in a motor vehicle, in violation of G. L. c. 90, § 24I (open container violation); and failing to have a current and valid inspection sticker, in violation of G. L. c. 90, § 20. After a jury trial, the defendant was convicted of an open container violation and acquitted of the OUI charge. The defendant appealed disputing whether an open container violation is a civil infraction or criminal offense within the "civil motor vehicle infraction" in G. L. c. 90C, § 1.

ISSUE: Whether an open container offense may be deemed an "automobile law violation?

Conclusion: The SJC concluded that possession of an open container of alcohol in a motor vehicle relates to the safe operation or use of a motor vehicle. The open container statute was originally enacted to protect against drunk driving. Based on this analysis, possession of an open container of alcohol in a motor vehicle is a **civil motor vehicle infraction**, rather than a criminal offense.

As part of its analysis, the SJC examined ***Commonwealth v. Giannino***, 371 Mass. 700, (1977), where the Court held that automobile violations must necessarily and exclusively encompass the operation or control of a motor vehicle. Pursuant to G. L. c. 90C, a statutory violation may be considered either a "civil motor vehicle infraction" or a criminal offense. A civil motor vehicle infraction is defined as "an automobile law violation for which the maximum penalty does not provide for imprisonment," with certain exceptions not relevant here. G. L. c. 90C, § 1. The parties do not dispute that the open container law does not provide for imprisonment. The only question on appeal is whether a violation of the open container law may be considered an "automobile law violation."

The mere fact that an offense involves a motor vehicle does not ipso facto make it an automobile law violation." ***Id.*** at 702. Rather, an automobile law violation is defined specifically as a "violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles." G. L. c. 90C, § 1. The statute merely requires that a violation "relate to the operation or control of motor vehicles" to be considered an automobile law violation. G. L. c. 90C, § 1. Nothing in the definition requires that a statutory

violation "necessarily," let alone "exclusively," "encompass" the operation or control of a motor vehicle.

The SJC considered the purpose of the open container statute when it was enacted. State open container laws were expanded and viewed as serving "as an important tool in the fight against impaired driving." *65 Fed. Reg*. 51,532, 51,533 (2000). Despite the expansion in scope of the open container law, at bottom it is still "intended to protect the public from intoxicated drivers." ***Commerce Ins. Co.***, 452 Mass. at 660. The statute is applicable to the "passenger area" of a motor vehicle, which is defined broadly to include both "the area designed to seat the driver and passengers while the motor vehicle is in operation," as well as "any area that is readily accessible to the driver or a passenger while in a seated position." G. L. c. 90, § 24I. By contrast, the passenger area does not include the trunk, or any area "not normally occupied by the driver or passenger." ***Id.*** Significantly, by limiting the applicability of the statute to areas "readily accessible" to the driver or a passenger, the statute protects against alcohol being passed between passengers and the driver. The fact that the statute does not apply to areas "not normally occupied by the driver or passenger" is further indicative of this intent. ***Id.*** The statute thus is aimed at the prevention of drunk driving, and therefore relates to the safe operation and use of a motor vehicle. Accordingly, an open container violation constitutes an automobile law violation.

This conclusion is also bolstered by the table of citable motor vehicle offenses promulgated jointly by the registrar of motor vehicles and the Chief Justice of the District Court Department, which lists the maximum assessment (i.e., fine) for each citable automobile law violation. The table lists an open container violation as one such automobile law violation and designates it as a civil infraction. Thus, in light of the legislative history and plain language of the open container statute, as well as the table of citable motor vehicle offenses, the SJC found that a violation of G. L. c. 90, § 24I, is an automobile law violation and thus a civil motor vehicle infraction.

- **NOTE:** This case mentions that a passenger not wearing a seat belt is insufficient to stop a motor vehicle

Negligent Operation

- ***TRAINING TIP:*** While the case below focuses on what is necessary to sustain a conviction for negligent operation, it emphasizes that the parameters of the statute. All of these cases will be driven by the officer's observations and the specific facts surrounding the incident.

1. **operated a motor vehicle,**
2. **on a public way, and;**
3. **negligently, so that the lives or safety of the public <u>might be endangered</u>.** See G. L. c. 90, § 24 (2) (a).

Commonwealth v. Kaplan, 97 Mass. App. Ct. 540 (2020): On October 27, 2018, Amherst Police Officer Matthew Frydryk saw the defendant, Hannah Kaplan, driving her car through a public parking lot with the front seat passenger yelling and extending her torso outside of the side window of the car while holding onto the roof. Officer Frydryk followed the defendant as she drove out of the parking lot and pulled her over without incident. The officer's reason for stopping the vehicle was that driving with the passenger outside the vehicle in the manner we have described was unsafe and negligent manner. The defendant was charged with operating under the influence of alcohol, G. L. c. 90, § 24 (1) (a) (1); negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a); and unsafe operation of a motor vehicle, G. L. c. 90, § 13. She filed a motion to suppress the evidence obtained during the traffic stop on the grounds that the police lacked probable cause or reasonable suspicion to stop her car.

Conclusion: The Appeals Court concluded that the defendant's act of driving while her passenger had her torso extended out the window and was yelling was sufficient to give the officer reasonable suspicion of negligent operation under G. L. c. 90, § 24 (2) (a), because it posed a risk to others on the road.

The primary issue the Appeals Court had to consider was whether a passenger hanging outside of a window could cause potential danger to the public, not whether it actually did. Pursuant to G. L. c. 90, § 24 (2) (a), which provides that "whoever operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered shall be punished." The three elements required for negligent operation are following:

(1) the defendant operated a motor vehicle;
(2) upon a public way; and
(3) (recklessly or) negligently so that the lives or safety of the public might be endangered.

The third element is the issue in this case.

There was reasonable suspicion that the defendant's operation of the vehicle while her passenger's torso was extended out the window and she was yelling might have endangered the lives and safety of the public. The defendant's view out the side window was necessarily obstructed as was, it could be inferred, her ability to see and use the side view mirror. Driving in such circumstances endangered others on the road. Moreover, the passenger's position and behavior were a significant distraction to the defendant and to other motorists late at night in a busy area. This, too, endangered the lives or safety of others. See ***Commonwealth v. Teixeira***, 95 Mass. App. Ct. 367, 370-371 (2019) (even without evidence of erratic driving, jury could conclude defendant put lives of public in danger when he consumed alcohol, drove substantially below speed limit while holding cell phone one foot from his face); ***Commonwealth v. Ross***, 92 Mass. App. Ct. 377, 380 (2017) (defendant speeding on dark tree- and fence lined road, at night, through residential area during Memorial Day weekend); ***Commonwealth v. Ferreira***, 70 Mass. App. Ct. 32, 33-35 (2007) (driver accelerated and fishtailed out of parking spot in parking lot with no pedestrians nearby or other erratic driving); ***Commonwealth v. Duffy***, 62 Mass. App. Ct. 921 (2004) (defendant and two others riding motorcycles in populated neighborhood on holiday afternoon at speeds twice speed limit).

Secondly, the defendant's passenger was holding onto the roof of the car, presumably to steady herself as her torso was extended outside the window. The defendant was thus driving with a person "hanging onto" the outside of her car, and the officer was justified in stopping the defendant for a civil traffic violation under G. L. c. 90, § 13. Based on the circumstances, the motion to suppress was reversed.

A. Distracted Driving

Commonwealth v. Ismael Teixeira, 95 Mass. App. Ct. 367 (2019): The Appeals Court holds that the defendant drove negligently so as to put the lives or safety of the public in danger when he had consumed alcohol and drove substantially below the speed limit while holding a cell phone one foot from his face even though there was no evidence of erratic driving.

B. Excessive Speed

Commonwealth v. Dejon Ross, 92 Mass. App. Ct. 377 (2017): The Appeals Court affirmed the defendant's conviction and held that excessive speed at night, on a narrow residential two-lane road lined

with trees, poles, and fences along with consumption of alcohol was sufficient to establish that the defendant operated a motor vehicle negligently. Pursuant to G. L. c. 90, § 24(2)(a), the Commonwealth must prove that the defendant (1) operated a motor vehicle (2) upon a public way (3) negligently so that the lives or safety of the public might be endangered.

C. Broken Equipment

Commonwealth v. Zagwyn, 482 Mass. 1020 (2019): Barnstable police stopped a vehicle after they noticed one of the headlights and a rear license plate light were not working. The officer followed the vehicle for approximately one to one and one-half miles before stopping it. While following the vehicle, the officer did not observe the vehicle speeding, swerving, or making any sudden stops. After the vehicle was stopped, the defendant moved the vehicle to a safe location. The stop itself revealed evidence that he was operating the vehicle while under the influence of alcohol. The officer charged the defendant with OUI liquor and negligent operation.

"Although evidence of an operator's intoxication is relevant to a charge of negligent operation, a conviction of negligent operation requires more than just operating a motor vehicle while under the influence of alcohol. The two crimes are separate. The charge of negligent operation has a low threshold because it only requires a showing that the defendant operated the vehicle "negligently so that the lives or safety of the public might be endangered, not that it in fact did." G. L. c. 90, § 24 (2) (a). ***Commonwealth v. Ferreira***, 70 Mass. App. Ct. 32, 35 (2007). Equipment failure such as a broken headlight and license plate light along with signs of intoxication are not enough to prove negligent operation.

B. Motor Vehicle Stops

Traffic Stops and Exit Orders

The SJC has held that there are three (3) bases that justify police issuing an exit order to the driver or passenger in a validly stopped vehicle:

1. An objectively reasonable concern for safety of the officer;
2. Reasonable suspicion that the driver or passenger is engaged in criminal activity, or
3. "Pragmatic reasons."

With regard to the first factor, "it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." ***Commonwealth v. Cruz***, 459 Mass. 459 (2011).

Safety Concerns During Motor Vehicle Stops

Safety concerns are heightened when police stop a vehicle with gang members that may be armed.

Commonwealth v. Stack, 49 Mass. App. Ct. 227 (2000): An informant told police that she had heard gang members talking about hitting enemy locations to "make money, steal dope, and take the weapons." All gang members agreed the murder would happen that night. The Appeals Court held

that the police were justified in issuing an exit order during a traffic stop involving gang members who may be armed. If there is a concern for officer safety during a traffic stop police do not need to see the driver or passengers commit any violations in order to issue an exit order.

An exit order and search of a vehicle were valid based on the "totality of the circumstances."

Commonwealth v. Obiora, 83 Mass. App. Ct. 55 (2013): Viewed in the "totality of the circumstances," a lone officer, late at night, with three detained persons and false identification information had "a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." The exit order was not "an intrusion disproportionate to the seriousness of the situation with which the trooper was confronted." See ***Commonwealth v. Washington***, 459 Mass. 32, 40 (2011).

Sudden movements made inside a vehicle during a traffic stop can be perceived as a safety issue.

Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737 (2015): The Appeals Court denied the motion to suppress. The Appeals Court compared this case to ***Commonwealth v. Gonsalves***, 429 Mass. 659 (1998), which established that "an officer need to only point to some fact or facts in the totality of the circumstances that would create a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." Here, the police officer was "faced with a specific, sudden and unexpected movement by the driver, into an area of the vehicle, containing a back-pack that could conceal weapon." The Appeals Court found that lunging towards the backseat was sufficient to raise a concern for officer safety.

Commonwealth v. Meneide, 89 Mass. App. Ct. 448 (2016): The Appeals Court restricted Terry frisks of motor vehicles in this case because the defendant was the driver and sole occupant. After police stopped his motor vehicle, the defendant was cooperative and did not appear to pose a safety risk. The Appeals Court found that based on the facts in this case, a protective sweep would not extend to the armrest located in the backseat of the vehicle. The scope of a protective search within an automobile's interior must be limited by, and rationally connected to, a safety concern about the particular area to be searched.

In appropriate circumstances, a Terry type search may extend into the interior of an automobile.

Commonwealth v. Douglas, 472 Mass. 439 (2015): The SJC concluded that the protective sweep of the motor vehicle's interior was justified due to Douglas's subsequent conduct. In this case, there were a number of factors that justified the issuance of an exit order and the subsequent patfrisk of the occupants. The police were familiar with the defendant, knew he was involved in a gang and had a past history of crimes, including firearms offense. Additionally, the backseat passenger and the defendant made unusual movements and their hands were not visible. The defendant's failure to comply with police orders further elevated safety concerns. All these factors provided justification for the police that one of the passengers may be armed.

Reasonable Suspicion to Stop a Motor Vehicle

Commonwealth v. Puac-Cuc, 97 Mass. App. Ct. 590 (2020): On April 29, 2018, the defendant, Mario Pua-Cuc, was driving a Chevrolet sport utility vehicle in Framingham when Sergeant Philip Hurton ran a routine check of the license plate though the RMV database. Sgt. Hurton learned that the owner of the vehicle, one Norberto Puac-Cuc, did not have a valid driver's license. Sgt. Hurton pulled the vehicle over because the registered owner did not have a license. Sgt. Hurton did not see the driver before stopping the vehicle. As Sgt. Hurton approached the vehicle, he saw a male operator (the defendant) and two passengers. The defendant did not have identification, but did provide his name and date of birth. He was not the registered owner. Sgt. Hurton thought the defendant may have been drinking and after further questioning, the defendant made incriminating statements and ultimately was arrested for operating a motor vehicle while under the influence of intoxicating liquor, G. L. c. 90, § 24 (1) (a) (1), and operating a motor vehicle without a license, G. L. c. 90, § 10. The defendant filed a motion to suppress, which was allowed. The judge noted that there "no objective reasonable suspicion of criminal activity to justify stop." The Commonwealth's motion for reconsideration was denied and an interlocutory appeal was filed.

Conclusion: The Appeals Court held that police had reasonable suspicion to justify the stop after confirming through the RMV that the vehicle's registered owner did not have a license.

1st Issue: Did the police have reasonable suspicion to stop the vehicle?

"Operation of a motor vehicle in Massachusetts without a proper license is a violation of law and an arrestable offense." **G. L. c. 90, § 21.** Since the registered owner was not licensed, the stop was valid if Sergeant Hurton could reasonably infer that the owner of the vehicle was driving it at the time of the stop. See ***Commonwealth v. Garden****,* 451 Mass. at 45-46. The SJC has held on two prior occasions that police may stop a vehicle, consistently with the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, based solely on the knowledge that the owner of a vehicle traveling on a public way was not licensed.

In ***Commonwealth v. Deramo***, 436 Mass. at 41-43, an officer stopped a vehicle that he recognized, under circumstances where the officer could not see the driver but knew that the owner's license had been revoked. The ***Deramo*** court held that the reasonable suspicion standard was satisfied: "the police may, in the absence of any contrary evidence, reasonably conclude that a vehicle is likely being driven by its registered owner." ***Id***. at 43. Subsequently in ***Garden***, the SJC reiterated this holding and found that where police officers stopped a vehicle based solely on an RMV check, which revealed that the owner of the vehicle, a female, had a suspended license. ***Garden***, 451 Mass. at 44-45. In ***Garden***, the officers could not see the driver before they stopped the vehicle. The court accordingly held that, under ***Deramo***, the stop was valid, even though after the stop one of the officers was able to observe that the driver of the vehicle was a man and not a woman. ***Garden***, ***supra*** at 46.

Both ***Deramo*** and ***Garden*** established, for the Massachusetts courts, that Hurton had reasonable suspicion for the stop here. The only question remaining is whether the Supreme Court has reached a different conclusion than ***Deramo*** and ***Garden***, when applying the Fourth Amendment. Recently, the Court addressed the same issue in ***Kansas v. Glover***, 140 S. Ct. 1183 (2020), and ruled that there was no Fourth Amendment violation. In that case***,*** a police officer had stopped a vehicle after running a records check, through which the officer determined that the license of the vehicle's registered owner had been revoked***.*** ***Id.*** at 1187. The officer did not see the driver before he conducted the stop. ***Id***. The Supreme Court held that based upon those facts, the officer could properly rely on the "commonsense" "inference that the driver

of a car is its registered owner," and that the officer had reasonable suspicion to justify the stop. ***Id***. at 1188. The Court did note that "the presence of additional facts might dispel reasonable suspicion. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties, but observes that the driver is in her mid-twenties." ***Id***. at 1191. In the present case, the officer did not see the defendant until the officer had stopped the vehicle and approached it on foot, and even then, the officer observed that the defendant was the same sex as the owner. There were thus no facts known to the officer that would have undermined the inference that the driver was the vehicle's owner. Based on ***Deramo***, ***Garden*** and ***Glover*** cases, there was reasonable suspicion for the stop, and no basis for suppression.

2nd Issue: Was the stop pre-textual?

The Appeals Court held that there was no indication that the stop was pretextual. A stop is not unlawful, however, solely because the police had a subjective purpose that is different than the proffered basis for the stop -- as long as there was a lawful basis for the stop. See ***Commonwealth v. Buckley***, 478 Mass. 861, 866-873 (2018). "Pretext," standing alone, is not a reason for suppression. While is unlawful to stop a vehicle based upon the race of the driver, there was no evidence that indicated that the stop was based upon race; ***Commonwealth v. Lora***, 451 Mass. 425, 437-439 (2008). Sgt. Hurton testified that he did not see the vehicle's occupants until after he effected the stop, and no evidence was presented that would support a contrary conclusion. Indeed, the defendant did not argue that the stop was based upon race.

Running a License Plate is Reasonable Under the Fourth Amendment

Kansas v. Glover, 140 S. Ct. 1183 (2020): In April 2016, a sheriff on routine patrol ran the plate of 1995 Chevrolet pickup with a Kansas plate. The sheriff learned that the truck was registered to Charles Glover, Jr., and he had a revoked license in the state of Kansas. Assuming that Glover was the driver, the sheriff stopped the vehicle event though he did not observe any other traffic violations. The driver, Charles Glover, filed a motion to suppress any evidence that was seized during the traffic stop and he argued that the officer lacked reasonable suspicion to stop the motor vehicle and that his Fourth Amendment Rights were violated. The District Court suppressed the evidence and on appeal, the Kansas Court of Appeals concluded that it was reasonable for the officer to infer the driver was the owner of the vehicle. The Court heard this case after the Kansas Supreme Court held that this officer only had a hunch that the defendant was committing criminal activity. The Court heard the case on appeal.

Conclusion: The Court held that when an officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

The Fourth Amendment allows an officer to conduct an investigative traffic stop when the officer has a particularized and objective basis for believing the particular person has committed a crime. Here, the owner's license had been revoked under Kansas law, which lent "further credence" to the inference that the owner was driving the vehicle. In Kansa, a revocation means that the driver had "already demonstrated a disregard for the law." ***Id***. at 1188-1189. The Court did not rest its conclusion on the fact that the owner's license was revoked, however, noting that "common sense suffices to justify this inference." ***Id.*** at 1188.

Recap of Pre-textual Stops

Commonwealth v. Rogelio Buckley, 478 Mass. 861 (2018): As long as there is legal justification for a traffic stop, the officer's underlying motive for the stop is not relevant. The SJC concluded that the police were justified in stopping the defendant's motor vehicle for speeding. According to the defendant, the standard established in ***Commonwealth v. Santana***, 420 Mass. 205 (1995), should be overturned because it permits police to conduct pretext stops. In ***Santana***, the SJC clarified that the "authority to conduct a traffic stop where a traffic violation has occurred is not limited by the fact that the police may have believed that the driver was engaging in illegal drug activity." An authorization test was developed in ***Santana*** and established that "a traffic stop is reasonable for art. 14 purposes so long as the police are doing no more than they are legally permitted and objectively authorized to do, regardless of the underlying intent or motivations of the officers involved." ***Buckley***, ***supra*** at 865. In his appeal, the defendant argued that the SJC should examine the police officer's true motive to investigate suspected criminal conduct during a traffic stop.

The SJC found that if it overturned the authorization test, courts would be required not only to determine whether the police initially possessed some underlying motive that failed to align with the legal justification for their actions, but also to assess whether the police were acting with an improper motive when engaging in the challenged action. The authorization test avoids speculative probing of a police officer's true motives while providing an administrable rule that can be applied by police in the field as well as reviewing courts. Moreover, many traffic violation statutes regulate moving cars and relate directly to the promotion of public safety; even those laws that have to do with maintaining a vehicle's equipment in accordance with certain standards may also be safety-related. Permitting stops based on reasonable suspicion or probable cause that these laws may have been violated gives police the ability to immediately address potential safety hazards on the road. Although a vehicle stop does represent a significant intrusion into an individual's privacy, the government interest in allowing such stops for the purpose of promoting compliance with our automobile laws is clear and compelling."

The defendant raised the issue that pretextual stops, particularly stops motivated by the race of the driver, can result in racial profiling. Racial profiling "is at base a claim that police selectively enforced the laws in contravention of the Fourteenth Amendment and arts. 1 and 10." See ***Commonwealth v. Lora***, 451 Mass. 425, 436 (2008). The SJC previously determined that if there was racial profiling, it was permitted to inquire into officers' subjective motives in that specific case because it, "involved a challenge to a traffic stop based on equal protection grounds." In ***Lora***, the court established that when considering the purpose of a stop or assessing its validity, would do so pursuant to the equal protection principles of arts. 1 and 10 — not art. 14's guarantee against unreasonable seizures — and only where a driver has alleged that race was the reason for the stop. Here, racial profiling was not an issue and there was no allegation of impermissible discrimination during the traffic stop. The SJC noted that there the defendant did not argue on appeal that he was racially profiled.

C. Motor Vehicle Searches

Standards for an Inventory Search

The United State Supreme Court held that the contents of a lawfully impounded vehicle may be inventoried without a warrant as part of a standardized administrative procedure. See ***Colorado v. Bertine***, 479 U.S. 367 (1987); and ***South Dakota v. Opperman***, 428 U.S. 364 (1976).

The rational for inventory searches is based upon non-investigatory reasons:

1. Protecting the person's property;
2. Protecting the police from claims of theft;
3. Protecting the police and the public from dangerous items.

See ***Commonwealth v. Matchett***, 386 Mass. 492 (1982).

Commonwealth v. Tisserand, 5 Mass. App. Ct. 383 (1977): If an impoundment is proper, evidence of criminal activity will not be suppressed even if the officers conducting an inventory have a contingent suspicion that the vehicle contains incriminating evidence.

Commonwealth v. Baptiste, 65 Mass. App. Ct. 511 (2006): Officers conducting an inventory who observe items that provide probable cause to believe that the vehicle contains evidence of a crime may then conduct an investigatory search of the vehicle based upon probable cause.

Commonwealth v. Benoit, 382 Mass. 210 (1981): If the primary motive of an inventory is to conduct an investigative search for evidence rather than the performance of administrative duties, evidence uncovered during the inventory will be suppressed.

Requirements for a Written Inventory Policy

Commonwealth v. Bishop, 402 Mass. 449 (1988): The SJC ruled that an inventory procedure must be in writing and police procedures can be considered standard only if they are in writing.

Commonwealth v. Peters**,** 48 Mass. App. Ct. 15 (1999): If the police policy is to conduct an inventory of both the vehicle and the person of the arrestee, then the written inventory policy should specifically authorize the search of both the vehicle and the arrestee.

The Scope of an Inventory Search

The written policy defines the scope of an inventory.

Commonwealth v. Caceres, 413 Mass. 749 (1992): The scope of an inventory may extend to the contents of any unlocked, but closed container.

In the absence of specific guidelines related to closed containers, such containers must be left untouched during an inventory search.

Without specific written guidelines, the contents of any closed container, even if unlocked, must be left undisturbed. See ***Commonwealth v. Muckle***, 61 Mass. App. Ct. 678, 684 (2004) (inventory procedure could have, but did not authorize the opening of closed, but unlocked containers).

Commonwealth v. Difalco, 73 Mass. App. Ct. 401 (2008): Whether an inventory policy might lawfully permit the opening of a locked container is undecided under Massachusetts law. "There is no explicit authority for the police to unlock a closed container and inventory the contents. The officer in this case was limited to inventorying a locked container as a single unit. The Appeals

Court made it clear that, if police open a closed container during an inventory search in the absence of a specific written procedure requiring them to do so, then any evidence discovered in the container must be suppressed."

Commonwealth v. Figueroa, 412 Mass. 745 (1992): The SJC held that an inventory procedure could extend into an open wall panel inside a passenger compartment because the police department's policy stated, that "an inventory listing of personal items and valuables will extend to all storage areas and compartments that are accessible to the operator and/or passengers. This encompasses all open areas, including the area under the seats, the glove compartment and other places where property is likely to be held." The SJC commented, that "it is clear that the officers stayed within the confines of this language when looking into an area behind the wall panel because that was an open area at the time the officers conducted their search."

Towing Motor Vehicles and Subsequent Searches

Commonwealth v. Garcia**,** 409 Mass. 675, 678 (1991): "The propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of the inventory search."

Commonwealth v. Daley, 423 Mass. 747, 750 (1996): "The impoundment of a vehicle for non-investigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended." When a defendant's vehicle is unregistered and uninsured, the police have no alternative but to impound it and have it towed.

Commonwealth v. Brinson, 440 Mass. 609 (2003): Where an arrestee's vehicle is legally parked in a privately owned lot and represents no safety hazard or risk of theft or vandalism, an impoundment and inventory of the vehicle cannot be justified on the mere basis of the defendant's arrest.

Commonwealth v. Allen, 76 Mass. App. Ct. 21 (2009): The Appeals Court concluded that opening a closed book bag and opening an unlocked container found inside was lawful. The key factor in this case was that the inventory policy of the department specifically stated that "all unlocked containers shall be opened and their contents inventoried."

Commonwealth v. Figueroa, 412 Mass. 745 (1992): The SJC found that plain observation and seizure of drugs behind cardboard panel in vehicle door was lawful and in accordance with the Department's policy regarding inventory searches.

Commonwealth v. Alvarado, 420 Mass. 542 (1995): Using a K-9 unit, while conducting an inventory search was prohibited because it transformed an inventory search into an investigatory search. Police may conduct an inventory of the contents of the automobile in accordance with standard, written department procedures.

Alternatives to Towing

The SJC held that police need to consider a reasonable alternative to impounding a motor vehicle!

Commonwealth v. Oliveira, 474 Mass. 10 (2016): The SJC concluded that where the driver had offered the police an alternative to impoundment that was lawful and practical under the circumstances,

it was unreasonable and thus unconstitutional to impound the vehicle and conduct an inventory search.

Under the United States and Massachusetts Constitutions, an inventory search is lawful only if the initial seizure (or impoundment) of the vehicle was reasonable, see ***Commonwealth v. Ellerbe***, 430 Mass. 769, 776 (2000) ("guiding touchstone "is reasonableness); and, second, the search of the vehicle that follows its seizure was conducted in accord with standard police written procedures. ***Id.*** at 773 n.8. See ***Commonwealth v. Brinson***, 440 Mass. 609, (2003) ("A lawful inventory search is contingent on the propriety of the impoundment of the car").

The SJC holds that the police should determine if towing a vehicle is reasonably necessary by inquiring if the driver has an alternative to impoundment, even where a driver does not request it.

Commonwealth v. Goncalves-Mendez, 484 Mass. 80 (2020): On August 4, 2016, Boston police stopped a Honda Accord with what appeared to be a defective brake light driving on Columbia Road in Dorchester. The officers learned from the vehicle's registration number, that the defendant, Wilson Goncalves-Mendez, who was registered owner had an outstanding misdemeanor default warrant for possession of marijuana with intent to distribution. Additionally, police verified that the passenger's driver's license was valid, and he had no outstanding warrants, nor was he a suspect in any other crimes. The passenger did not appear to be under the influence of any intoxicating substances and he cooperated with police. Police placed the defendant under arrest for a default warrant and informed the defendant his vehicle would be towed. The defendant did not ask the passenger to assume custody of the vehicle, and the police did not offer this alternative. As required by Boston police department policy, in preparation for impoundment, one of the officers searched the vehicle. The officer found a firearm under the driver's seat; when the officer implied that both the defendant and the passenger would be arrested, the defendant said that the firearm was his. The defendant was taken to the police station in a police cruiser and then questioned at the station. The passenger ultimately was allowed to leave the scene. The defendant was charged with multiple firearms offenses and he filed a motion to suppress the evidence that was found in the car and any statements that were made to police. The motion was allowed and the Commonwealth appealed.

Conclusion: The SJC suppressed the evidence recovered during an inventory search when the police decided to tow the vehicle.

1st Issue: Was the inventory search was lawful?

"A lawful inventory search is contingent on the propriety of the impoundment of the vehicle." ***Commonwealth v. Brinson***, 440 Mass. 609, 612 (2003). Impoundment must be undertaken for a legitimate, non-investigative purpose, and must be "reasonably necessary based on the totality of the evidence." See ***Oliveira***, ***supra*** at 13-14. The issue the SJC had to consider is whether the impoundment was "**reasonably necessary**." The validity of the stop depends on whether police reasonably could have concluded they had no lawful, practical alternative, where impoundment was deemed reasonable notwithstanding the presence of a passenger, the passenger was unable lawfully to assume custody of the vehicle. See ***Commonwealth v. Eddington***, 459 Mass. 102 (2011) (passenger had been observed drinking); ***Commonwealth v. Ellerbe***, 430 Mass. 769 (2000) (passenger did not have valid driver's license available); ***Commonwealth v. Caceres***, 413 Mass. 749 (passenger was not authorized to drive in Massachusetts); ***Commonwealth v. Garcia***, 409 Mass. 675 (1991) (passenger had outstanding warrants).

The SJC has held that police officers were required to honor an owner's or authorized driver's

requested alternative to impoundment where doing so was "lawful and practical and established the standard for impoundment is reasonableness." See ***Oliveira***, ***supra*** at 15. Additionally, an inventory search of a defendant's personal belongings was unreasonable where police were independently aware of an alternative to seizing them. See ***Commonwealth v. Abdallah****, 47*5 Mass. 47, 51-52 (2016) (inventory search of backpack was unreasonable where police were aware that hotel where defendant was arrested was willing to retain custody of his other belongings).

In the present case:

1. the officers were aware that the defendant's passenger lawfully could have assumed custody of the vehicle, yet nonetheless told the defendant that his vehicle "would be towed;" and

2. police did not consider the alternatives to impoundment available under the motor vehicle inventory policy.

According to Boston Police Department Rules and Procedures, Rule 103 § 31 (1984), officers have an option to "leave the vehicle with a person having apparent authority to assume control of it," when police is arresting a driver. Since the vehicle is being, no inventory search is conducted, because there is no risk of false claims against the police or the towing company. In the present case, Boston police thought that the departmental impoundment policy required towing a vehicle when it was not lawfully parked, and that the policy required an arrested driver affirmatively to request that custody be given to another individual before police were required to release the vehicle to that person. If the driver had requested the passenger to assume custody of the vehicle in this case, police would have had to honor it. However, the defendant never proposed this alternative and therefore the Commonwealth argued that the police did not have to ask the driver. The SJC found that it never held that police may disregard a readily apparent alternative to impoundment simply because a defendant does not request that a passenger be allowed to leave with the vehicle.

Where officers are aware that a passenger lawfully could assume custody of a vehicle, it is improper to impound the vehicle without first offering this option to the driver. Without asking, police cannot conclude that impoundment is "reasonably necessary." Since police did not ask in this case, the impoundment of the defendant's vehicle was improper. Moreover, because the validity of an inventory search turns on the propriety of the underlying impoundment, the search was unlawful. See ***Oliveira***, 474 Mass. at 13.

Although our holding in the present case in no way alters the established requirement that impoundment be reasonable, we nonetheless acknowledge that we have never before had occasion to articulate what is reasonable under the circumstances presented here. Because the duty we articulate is not, strictly speaking, "dictated by precedent," **it shall apply prospectively**. See ***Commonwealth v. Sylvain***, 466 Mass. 422, 433-434, (2013).

2nd Issue: Should the exclusionary rule should apply?

The Commonwealth argued that, even if the search was unlawful, the evidence should not be suppressed, because the police have never had an affirmative duty to inquire whether a driver wishes a passenger to assume custody of a vehicle. We do not agree. The officers in the present case overlooked a readily apparent alternative to impoundment. As a result, their decision to impound the defendant's vehicle fell short of the established requirement that impoundment be "reasonably necessary." Moreover, the officers' apparent misunderstanding of the Boston police department's inventory policy does not justify unreasonable conduct. **The policy clearly allows for transfer of a vehicle to a third party, and does**

not condition this alternative on a driver requesting it. The suppression was appropriate here, and that evidence directly obtained from the search of the vehicle properly was suppressed. See ***Balicki***, 436 Mass. at 15.

Parameters of an Inventory Search

A vehicle may be seized for one of four legitimate purposes:

a. to protect the vehicle and its contents from theft or vandalism, see ***Ellerbe***, 430 Mass. at 775;

b. to protect the public from dangerous items that might be in the vehicle, see ***United States v. Coccia***, 446 F.3d 233, 240 (1st Cir. 2006);

c. to protect public safety where the vehicle, as parked, creates a dangerous condition, see ***Brinson,*** 440 Mass. at 615-616; ***Commonwealth v. Henley****,* 63 Mass. App. Ct. 1, 5-6 (2005); or

d. where the vehicle is parked on private property without the permission of the property owner as a result of a police stop, to spare the owner the burden of having it towed. If the true purpose for searching the vehicle is investigative, the seizure of the vehicle may not be justified as a precursor to an inventory search, and must instead be justified as an investigative search. See ***Commonwealth v. White***, 469 Mass. 96, 102 (2014); ***Commonwealth v. Vuthy- Seng***, 436 Mass. 537, 551-555 & n.16 (2002).

The Appeals Court held that the police had probable cause to stop the motor vehicle and the subsequent inventory search was valid!

Commonwealth v. Juan Rosario-Santiago, 484 Mass. 1105 (2019): On October 9, 2014, Trooper Michael Reynolds stopped a Toyota Camry after observing the vehicle abruptly change lanes, speeding and driving less than one car length behind the vehicle traveling ahead. The defendant, Juan Rosario-Santiago was the sole occupant and driver. The defendant produced a New Hampshire driver's license and registration. When the defendant was asked where he was headed, he said he came from New York and was meeting a friend downtown. The defendant had delayed responses to the trooper's routine questions, which led the trooper to suspect the defendant was making up answers. The trooper learned from the defendant that he had "some trouble with the Federal authorities in New Hampshire regarding drug distribution." When the trooper headed towards his cruiser to verify the defendant's information, he noticed a "fast-food bag" on the rear passenger floor of the Camry.

A license check revealed that the defendant had a suspended Massachusetts license and that he had been charged by the Drug Enforcement Administration (DEA) in the past "with distribution of synthetic narcotics." While waiting in his cruiser for the information to process, the trooper saw the defendant reach toward the back of the car in a subtle way, acting as though he was yawning. The trooper believed the defendant was reaching for the fast food bag. Based on his observations, the trooper asked the defendant to step out of the vehicle while he conducted a pat frisk. Two cell phones and keys were recovered during the patfrisk. The defendant was placed in the cruiser and a tow truck was called. The defendant could not drive the Camry away with a suspended license.

Prior to the arrival of the tow truck, the trooper began to inventory the contents of the vehicle as required by the written State Police inventory policy. The trooper found an empty, "clear plastic heat-sealed packet that had a ripped corner. The packet was located inside the fast food bag. There were small black elastic bands near the front seat and a cup of urine in center console. The trooper noticed a "crease" in the carpet of the Camry. Based on his training and experience, the trooper believed that the vehicle could have a mechanical hide which created the crease when it was opened." The trooper also knew that people who engage in drug distribution and drive long distances, often do not want to stop use restrooms because this gives them greater risk of exposure. During the inventory, the trooper found an "aftermarket wire" that ran from the dashboard area near the radio, trailing to the back area of the console. After making these observations, the trooper formally arrested the defendant. The trooper handcuffed the defendant and further searched his person, discovering a wad of money. The defendant was returned to the back of the cruiser and the Camry was towed to the State Police barracks.

At the barracks, the troopers examined the undercarriage of the Camry, and they "saw a weld mark in the middle of the muffler that looked like it had been altered and lowered." "By applying power to some wires that went to the console, the troopers actually operated the mechanical hide and" discovered that the console rose up from the floor to reveal a compartment. Inside the console were several "packets of oxycodone pills that were taped up and otherwise secured with the same type of rubber bands as were found in the car." The defendant was charged and filed a motion to suppress and a motion for reconsideration. Both were denied. The defendant filed a further appeal and argued that the police exceeded the bounds of the inventory search and no other exception the warrant requirement applied in this case.

Conclusion: The Appeals Court held that the police had probable cause to arrest and that tow and subsequent inventory were valid.

1st Issue: Probable Cause to Arrest:

The trooper's observations of how the defendant was driving the Camry justified the stop. At the time of incident, the trooper's reliance on the information he received from police dispatch and the Registry of Motor Vehicles was reasonable. The defendant provided at a later date documentation that his license was expired and not suspended. Although the trooper had inaccurate information regarding the defendant's license status, it did not diminish the validity of the stop. Compare ***Commonwealth v. Wilkerson***, 436 Mass. 137, 140-141 (2002) (probable cause to arrest not vitiated by fact that police were relying on erroneous information obtained from Registry of Motor Vehicles records that defendant's license had been revoked. Here, the Appeals Court emphasized that it is important to determine what the officer knew at the time he made the decision to arrest the defendant. Once the trooper received information from the State Police dispatcher that the defendant's license or right to operate had been suspended in Massachusetts, he had probable cause to arrest the defendant.

2nd Issue: Inventory Search:

The Appeals Court held that the tow of the vehicle was lawful because the defendant had a suspended license and the vehicle could not safely remain on the side of Route 495 at 6PM. The second issue the Appeals Court considered was whether the inventory of the defendant's vehicle was proper. Although a well-established exception to the warrant requirement, an inventory search must hew closely to written police procedures and may not conceal an investigatory motive. See ***Commonwealth v. Rostad***, 410 Mass. 618, (1991). The lawfulness of an inventory search turns on the threshold propriety of the vehicle's

impoundment, and the Commonwealth bears the burden of proving the constitutionality of both. See ***Commonwealth v. Eddington,*** 459 Mass. 102, (2011); ***Commonwealth v. Ellerbe***, 430 Mass. 769, (2000)." ***Commonwealth v. Ehiabhi***, 478 Mass. 154, (2017).

According to the State Police inventory policy, all closed and unlocked containers along with their contents should be inventoried prior to tow. Here, the trooper adhered to the requirements of the policy which included searching the fast food bag that was discarded on the floor of the rear passenger seat. The fact that the trooper opened the bag before the glove compartment is not dispositive and does diminish the validity of the inventory.

The defendant also contends that the purpose of the inventory was investigative, not administrative (i.e., not to obtain an inventory). Further, the defendant claims that the trooper opened the fast food bag because he was investigating for drugs. The court determined that the trooper looked within the bag and up long enough to determine its contents and whether the trooper had suspicions that the defendant may was involved in drug trafficking does not invalidate the validity of the inventory. See ***Commonwealth v. Horton***, 63 Mass. App. Ct. 571 (2005) ("Even the fact that the police might have suspected that the inventory search could turn up more weapons does not make it an impermissible pretext search. See ***Commonwealth v. Garcia***, 409 Mass. 675, 679 [1991], and cases cited").

The Appeals Court also found that the trooper's stop was not a pretext stop and it distinguished the facts in this case from Ortiz. In ***Ortiz***, the DEA had targeted the defendant in advance. The DEA explicitly directed the state police stop the defendant for traffic violation because it had learned he had a suspended license and would be transporting cocaine within his vehicle. The explicit directive from the DEA qualified as pretext to search the defendant's vehicle for investigative purposes," i.e., "with the expectation that impoundment and an inventory search of the defendant's motor vehicle would follow." ***Id***. at 574. Here even if the trooper may have harbored a suspicion that evidence of criminal activity might be uncovered as a result of the search, it does not vitiate his obligation to conduct the inventory. ***Commonwealth v. Tisserand***, 5 Mass. App. Ct. 383, (1977). After considering these factors, the Appeals Court held that inventory was valid and not investigative.

3rd Issue: Automobile Exception:

The Appeals Court found that troopers had probable cause to investigate the wire they found in the dashboard under the automobile exception. The motion judge previously determined when the trooper looked underneath the dashboard to see if he could observe a wire leading to a hidden compartment, the vehicle search "morphed into something beyond inventorying property." However, the trooper's decision to discover the source of the wire was justified based on the information the trooper had. The trooper initially observed the defendant driving fast and erratic. During the motor vehicle stop, the defendant seemed to be making up answers as he went along in response to early, routine questions. The trooper saw the defendant surreptitiously reached [toward] the bag in the back seat while he was verifying the defendant's license status. Lastly, the trooper found an open heat-sealed baggie in the fast food bag along with evidently urinated in a cup rather than stop; and there [were] elastics of the type used to bind cash and drugs during an inventory. All of these facts spelled 'hidden compartment' to the experienced trooper even though any one of the factors may not have spelled illegal activity."

The wear marks in the Camry's carpet that, the trooper knew from his training were consistent with a hidden compartment, or "hide, were another factor. These marks were in plain view and immediately apparent to the trooper, given his expertise that they were connected to a hide. See ***Commonwealth v.***

Santana, 420 Mass. 205, 211 (1995). The trooper had probable cause at this point to search the Camry for drugs and other evidence of drug trafficking (including a wire leading to a hide), an automobile search that clearly fell within a recognized exception to the warrant requirement. See ***Davis***, 481 Mass. at 220 ("Due to the inherent mobility of an automobile, and the owner's reduced expectation of privacy when stopped on a public road, police are permitted to search a vehicle based upon probable cause to believe that it contains evidence of a crime"). In ***Davis***, the court determined that the introduction of a drug sniffing dog converted the inventory search into an investigatory one, ***id.*** at 219-220; however, the search of the glove compartment was upheld because the officer had probable cause to believe that it contained evidence of a crime. ***Id.*** at 221-222. So, too, here, armed with probable cause to search for drug evidence, the troopers properly searched the car, including for a wire leading to the hidden compartment and then the compartment itself. 'What the police may not do is hunt for information by sifting and reading materials taken from an arrestee which do not so declare themselves. ***Commonwealth v. Sullo***, 26 Mass. App. Ct. 766, 770 (1989). The Appeals Court concluded that the police had probable cause to search the vehicle for a hide based on the discovery of the wire and wear marks in the carpet. These two factors along with other observations satisfied the probable cause requirement of the automobile exception.

Clarity on Patfrisks & Exit Orders

The SJC clarifies the standard for issuing an exit order and conducting a patfrisk.

I. An **exit order** is justified during a **traffic stop** where:

(1) police are warranted in the belief that the **safety of the officers or others is threatened**;

(2) police have reasonable suspicion of **criminal activity**; or

(3) police are **conducting a search of the vehicle on other grounds**.

II. A lawful **patfrisk requires more**:

Police must have a reasonable suspicion, based on specific articulable facts, that the suspect is **armed *and* dangerous**.

Commonwealth v. Torres-Pagan, 484 Mass. 34, (2020): On an evening in the spring of 2017, two Springfield police officers observed a motor vehicle with a cracked windshield and an expired inspection sticker. The officers stopped the vehicle that the defendant, Manuel Torres- Pagan, was driving. The defendant was the sole occupant. As the officers approached, the defendant got out of his vehicle and stood between the open door and the front seat, facing the officers. The defendant turned to look inside the vehicle on more than one occasion. One of the officers ordered the defendant to stay where he was and the defendant complied. The officers placed the defendant in handcuffs and conducted a pat frisk of his person. When the officers found a knife in the defendant's pants pocket, they asked the defendant if he had other weapons in his vehicle. The defendant indicated that he did, and the officers subsequently seized a firearm from the floor in front of the driver's seat. The defendant was charged with multiple crimes after a warrantless search of his motor vehicle and he filed a motion to suppress arguing that the evidence was discovered after the police conducted an unlawful patfrisk. The Superior Court allowed the motion to suppress.

Conclusion. The SJC affirmed the allowance of the motion to suppress and held that the patfrisk of the

defendant and search of his vehicle were unconstitutional. The SJC clarified that there the standards justifying an exit order do not automatically authorize a frisk. Rather, police must show particular facts establishing reasonable suspicion that the suspect is armed and dangerous to justify a patfrisk.

1st Issue: Are the standards for conducting a patfrisk and issuing an exit order the same?

The SJC acknowledged that their articulation of the patfrisk standard has not always been clear. Specifically, the SJC recognized that there was a need to clarify the patfrisk standard as it relates to exit orders. A patfrisk is permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous. ***Commonwealth v. Narcisse***, 457 Mass. 1, (2010); ***Arizona v. Johnson***, 555 U.S. 323, 326-327 (2009); ***Terry***, 392 U.S. at 27. The protection provided by the Massachusetts Declaration of Rights is coextensive with that of the United States Constitution in this regard. "Police officers may not escalate a consensual encounter into a protective frisk absent a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense and is armed and dangerous," and that "a reasonable belief that an individual has a weapon and appears inclined to use it acts to satisfy both prongs of the Terry analysis." In order to justify a pat down of the driver or a passenger during a traffic stop, as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."

An officer needs **both** reasonable suspicion to believe that a suspect is **armed and dangerous** along with **concerns for safety to justify a patfrisk**. See ***Commonwealth v. Gomes***, 453 Mass. 506, 512 (2009). Without a more particularized fear that the suspect is presently armed and dangerous, the officer cannot take the more intrusive step of patfrisking the suspect. ***Terry,*** 392 U.S. at 24-25.

The SJC also clarified the three reasons that justify issuing an exit order during a traffic stop:

(1) police are warranted in the belief that the safety of the officers or others is threatened;
(2) police have reasonable suspicion of criminal activity; or
(3) police are conducting a search of the vehicle on other grounds.

After a person is out of the vehicle, police must have reasonable suspicion based on specific articulable facts, that the suspect is armed and dangerous, before a patfrisk is constitutionally permissible. According to the SJC, it is logical to have different standards for an exit order and patfrisk. An exit order is considerably less intrusive than a patfrisk, which is a "severe intrusion upon cherished personal security that must surely be an annoying, frightening, and perhaps humiliating experience." ***Terry***, 392 U.S. at 24-25. The only legitimate reason for an officer to subject a suspect to a patfrisk is to determine whether he or she has concealed weapons on his or her person. See ***Commonwealth v. Silva***, 366 Mass. 402, 407-408 (1974). There is no justification **to conduct a patfrisk** which is intrusive unless police have **reasonable suspicion to believe that the suspect is dangerous and has a weapon**.

2nd Issue: Did the police have reasonable suspicion to conduct a patfrisk?

Based on the totality of the circumstances the SJC found that the police lacked reasonable suspicion to conduct a patfrisk of the defendant. The defendant's action of getting out of the vehicle after police stopped him for a motor vehicle violation raised concerns. The question was whether the defendant's actions presented safety concerns. Here, the facts suggest that the police had a full view of the defendant's hands and body as they approached him. While the defendant turned to look into the front seat area of his vehicle multiple times, he complied when police told him not to move. There was no indication that the defendant's

movements were stealth or secretive. The SJC recognized that the defendant's action of getting out of the vehicle was unexpected but found that it did not raise the suspicion that the defendant was armed and dangerous. ***Stampley***, 437 Mass. at 326 (defendant's initial behavior during routine traffic stop, although "peculiar" and "unusual," was not threatening). Unlike ***DePeiza***, 449 Mass. at 371, 374, where a patfrisk was justified when the defendant walked with his "right arm held stiff and straight against his body," suggesting that he carried firearm, the defendant here was cooperative and his hands were visible. The fact that the defendant turned to look into the front seat of his vehicle more than once after he got out adds little if anything to the analysis. Looking into the vehicle may suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person. See ***Terry***, 392 U.S. at 29-30 (patfrisks must be "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him should weapons be discovered"). The SJC did not find the defendant's exit of his vehicle on his own accord an indicator of a safety issue.

The second factor the SJC evaluated was whether the timing of the events rapidly unfolding was significant in the reasonable suspicion analysis. See, e.g., ***Commonwealth v. Vazquez***, 74 Mass. App. Ct. 920, 923 (2009) ("During an investigation, unfolding events are often interconnected and dynamic, requiring facts to be considered in totality when determining reasonable suspicion"). There was no indicating that the events unfolded so quickly to suggest the defendant was armed and dangerous. Rather, the facts suggest the defendant made no furtive movements when he got out of the vehicle. Again the defendant's body and hands were visible to the police and he was fully compliant with all commands and he was outnumbered.

Third, the fact the stop did took place in an area considered a "high crime neighborhood" did not tip the scale to tip the scale in the reasonable suspicion analysis to justify police conducting a pafrisk. See ***Commonwealth v. Meneus***, 476 Mass. 231, 238 (2017) ("we look beyond the term 'high crime area' to determine whether the inferences fairly drawn from that characterization demonstrate the reasonableness of the intrusion"); ***Jones-Pannell***, 472 Mass. at 435 ("That one or more 'crimes' occurred at some point in the past somewhere on a particular street does not necessarily render the entire street a 'high crime area,' either at that time or in perpetuity"). After evaluating all the factors presented, the SJC concluded that the police lacked reasonable suspicion to conduct a patfrisk.

D. Miscellaneous Motor Vehicle Issues

Camper Qualified as a Vehicle

A camper affixed to the bed and roof of a pickup truck was a "vehicle" within the meaning of G. L. c. 269, § 10(b), and the Commonwealth proved that the defendant had control over a spring-loaded knife discovered within the camper's sleeping area.

Commonwealth v. Davenport, 97 Mass. App. Ct. 279 (2020): Detective Lawrence Donovan of the Avon Police Department issued a broadcast for the defendant, John Davenport's vehicle, after he interviewed a woman about an incident involving her and the defendant. Raynham Police found the defendant's vehicle in a Wal-Mart parking lot with a camper attached. Detective Donovan knocked on the door of the camper, and the woman with whom he had previously spoken opened the door and stepped outside. The defendant eventually came out after Detective Donovan knocked on the camper door for twenty to thirty minutes. The detective placed the defendant under arrest. Police secured and locked the pickup truck and camper, and transported them to the Avon police station. After obtaining a search warrant, police recovered from the

camper's sleeping area a spring-loaded knife with a four-inch blade that had the defendant's DNA on its handle.

The camper was partly attached with bungee cords and ropes to the bed and roof of the truck. The camper was hooked up to a generator, which was outside and running. It did not have its own driving cab, and there was no access to it from the truck; the only access was through a door in the rear of the camper. Detective Donovan testified that the defendant lived in the camper as well. The defendant was convicted of Carrying a Dangerous Weapon (a spring-loaded knife) on his person or under his control in a vehicle in violation of G. L. c. 269, § 10(b). The defendant appealed and did not dispute that the knife was a dangerous weapon. However, he argued that the camper was not a vehicle according to the statute and that the knife was not under his control.

Conclusion: The Appeals Court affirmed the defendant's conviction and found (1) that the camper attached to the pickup truck was a vehicle for purposes of G. L. c. 269, § 10(b); and (2) that the defendant exercised control over the knife found in the camper's sleeping area.

In order to establish a violation of G. L. c. 269, § 10(b), the Commonwealth must prove that a defendant knowingly "carried on his person or under his control in a vehicle" a dangerous weapon. The Appeals Court found that the camper was a vehicle even though it was used as a residence at times. According to Black's Law Dictionary, a vehicle is "a device, such as a car or sled, for carrying passengers, goods, or equipment; conveyance." ***Black's Law Dictionary*** 1868 (11th ed. 2019) ("An instrument of transportation or conveyance"; "any conveyance used in transporting passengers or things by land, water, or air"). Here the camper was affixed to the truck and was used as means of transporting people and things and, as such, was a vehicle or at least part of a vehicle. Additionally, a camper that is attached to a motor vehicle is equally capable as a motorized camper of "carrying" -- i.e., "bearing or conveying from one place to another," ***American Heritage Dictionary*** 243 -- a prohibited weapon. The Appeals Court determined that whether the camper was used as residence had no impact on a § 10(b) violation because the statute, unlike § 10(a), does not have a residence exception. The camper was not used solely as a residence. There was evidence that the defendant drove his truck, with the camper attached, from Avon to Raynham. Although the defendant may have used the camper as a residence at times, he clearly used it as a means of transport.

The Appeals Court also found that whether or not the defendant could access the weapon during transport did not detract from establishing that the weapon was under the defendant's control in the vehicle. ***Commonwealth v. Collins***, 11 Mass. App. Ct. 583, 586 (1981) (sufficient evidence to support convictions of unlawful carrying of firearm under G. L. c. 269, § 10[a], where firearms were found in trunk of car). Here, the defendant owned the camper, he was alone inside for twenty to thirty minutes before complying with Detective Donovan's order to leave the camper, the knife was found in the defendant's sleeping quarters, and he was the major contributor to the DNA sample taken from the knife's handle. All of this evidence was sufficient to establish that the defendant had the requisite control over the knife.

E. Marked Lanes Violations

The SJC held that the officer was justified in stopping a motor vehicle that crossed over the fog line.

Commonwealth v. Larose, 483 Mass. 323 (2019): The SJC held that stopping a motor vehicle for crossing

over the fog line was justified. An officer stopped the defendant's vehicle after he observed the vehicle cross the right-side fog line "one time for two to three seconds." A video recording taken from the officer's dashboard camera showed the right-side tires of the defendant's motor vehicle cross over the right-side fog line, straddle the northbound travel lane and the narrow road shoulder for a few seconds, and return to entirely within the bounds of the northbound travel lane. This stop led to the defendant's arrest for operating a motor vehicle while under the influence of intoxicating liquor G. L. c. 90, § 24 and a marked lanes violation in accordance with G. L. c. 89, § 4A (§ 4A), a civil motor vehicle infraction punishable by a fine.

The defendant moved to suppress evidence gathered from the stop, arguing that the stop was conducted" without probable cause" and "without there having been a traffic violation and without reasonable suspicion of criminal activity. The motion was allowed and the judge found that "crossing a fog line one time for a few seconds does not constitute a marked lanes violation," and therefore the stop of the defendant's motor vehicle was not lawful. The motion judge reasoned that a fog line does not serve to divide lanes and there was no indication that the defendant's crossing the fog line was unsafe." The issue before the SJC on appeal was whether the defendant, in briefly crossing the right-side fog line, violated § 4A.

Conclusion: The SJC held that where the defendant failed to operate his motor vehicle entirely within his lane of travel when he crossed over the fog line, the observing police officer had sufficient reason to stop the defendant for a marked lanes violation under G.L. c. 89, §4A.

The SJC has consistently held that a stop is reasonable where an officer has observed a traffic infraction and belies that a driver may have violated an applicable motor vehicle law. ***Commonwealth v. Buckley***, 478 Mass. 861, 864 (2018). Here, the SJC first examined the language of § 4A. According to the SJC's interpretation, § 4A provides two separate, directives that drivers must follow. First, drivers must operate entirely within a single lane, which means that drivers must maintain their lanes and avoid drifting or swerving into an adjoining lane or the shoulder. Second, drivers must not move from their respective travel lanes without first ascertaining whether it is safe to do so. Essentially, a driver may violate the statute either by failing to maintain the driver's intended lane of travel or by failing to ascertain the safety of a movement from that lane before executing that movement. After carefully analyzing the statutory language and considering the intent of the legislature, the SJC concluded that a driver may violate § 4A by either failing to maintain his or her lane or failing to assess the safety of a movement from his or her lane regardless of whether a particular movement created a safety issue. An officer has discretion as to when to stop drivers for such possible violations.

Furthermore, the SJC concluded the plain language contained within 700 Code Mass. Regs. § 7.02 (2016) specifies that a fog line does not merely alert drivers to the edge of the travel lane. The fog line marks the right-hand edge of the travel lane and serves to separate the travel lane from the road shoulder. The SJC's conclusion that police are permitted to stop vehicles for marked lanes violations serves a significant government interest of ensuring public safety and adherence to Massachusetts' motor vehicle laws.

F. Registry of Motor Vehicle Update

REGISTRY OF MOTOR VEHICLES

Department	Contact Name	Phone	Fax	Email
Crash Records Handles all questions and training related to crash data reporting on the RMV CR65 Crash report, monthly crash data reports, and electronic crash report submission implementation.	**Donna DaVeiga**, Law Enforcement Liaison, Crash Records Program Manager	857-330-2557	NA	Donna.DaVeiga@dot.state.ma.us
Driver Licensing Reviews, processes, and monitors driving credential issuances.	**Steve Evans**, Director of Driver Licensing	857-368-8110	857-368-0818	Steve.Evans@dot.state.ma.us
Enforcement Services Unit (ESU) Handles instances of fraud and LEO services. ESU is partnered with a team of MSP personnel.	**Daniel Florent**, Deputy Register for Safety	857-368-9500	857-368-0649	Enforcementservices@dot.state.ma.us Constantly monitored, staff will expeditiously forward all LEO inquiries to appropriate personnel
School Bus/7D Student Pupil Oversees student pupil transportation industry, vehicle inspections, driver training, and application process.	**Margaret Rohanna**, School Bus Program Manager	857-368-7310	NA	SchoolBus7DNotify@dot.state.ma.us
Medical Affairs Bureau (MAB) Manages policies and procedures regarding minimum physical and cognitive qualifications to operate a motor vehicle. Law Enforcement Officials Provide MAB: - Requests for Medical Evaluation - Placard Abuse Reports	**Corrine Stellar**, Director of MAB	857-368-8020	857-368-0018	MassDOTmedicalaffairsbureau@dot.state. ma.us
Merit Rating Board (MRB) Maintains operation driver records including processing of citations, at-fault and comprehensive insurance claim records, and out-of-state driving records.	**Debra Eaton**, Asst. Director of Operations, MRB **Paul Franzese**, Director of MRB	857-368-7617 857-368-7610	857-368-0806	Deborah.Eaton@dot.state.ma.us Paul.Franzese@dot.state.ma.us ***Confidential Document: For Law Enforcement Business Use Only August 2020***

License Extensions (Class D&M)

Current Expiration	Extended Expiration
March 2020	September 2020
April 2020	September 2020
May 2020	September 2020
June 2020	October 2020
July 2020	November 2020
August 2020	December2020

Learners Permits

Current Expiration	Extended Expiration
March 2020	December 2020
April 2020	December 2020
May 2020	December 2020
June 2020	December 2020
July 2020	December 2020
August 2020	December 2020

REAL ID requirement has been extended to October 2021

Professional Licenses

School Bus Certificate
School Pupil (7D) License
Station Inspector License
Driving School Instructor License
Station Inspection License
Driving School License

All of these licenses which expired between March and August 2020 will now expire October 1, 2020.

Registration Extensions

Current Expiration	Extended Expiration
March 2020	July 2020
April 2020	July 2020
May 2020	July 2020
June 2020	July 2020

Inspection Extensions

Current Expiration	Extended Expiration
March 2020	July 2020
April 2020	July 2020
May 2020	July 2020

Chapter 2: CRIMINAL PROCEDURE

The Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights govern all police searches and seizures in Massachusetts.

Fourth Amendment of the United States Constitution

The Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Under the Fourth Amendment, the courts analysis on the reasonableness of the search will be based on the "totality of the circumstances."

Article 14 of the Massachusetts Declaration of Rights

Article 14 states, "every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." The court's analysis on the reasonableness of the search has two (2) aspects: (1) What is the legal standard under which the search will be justified (reasonable suspicion, probable cause, or some other standard) and (2) Is a search warrant required in all instances?

Reasonable Suspicion & Probable Cause

Reasonable Suspicion: Is based on specific and articulable facts upon which reasonable inferences can be drawn, that a person has committed, is committing, and is about to commit a crime, or is armed and dangerous. In ***Commonwealth v. Wren,*** 391 Mass. 705, (1984), the court stated "a *hunch will not suffice."*

Probable Cause*:** Is based on the belief that it is "more likely than not" that evidence will be discovered at a particular location. ***Commonwealth v. Haas, 373 Mass. 545 (1977).

A police officer may establish either reasonable suspicion or probable cause by either their own personal observations or from information received from other sources, such as: victim, witness, informant, anonymous tip, student, faculty, etc. However, when information is received from a source other than personal observations, police must establish the source's "basis of knowledge" and the "veracity" of the information.

Based on the facts of this case, the SJC holds that an officer's request to speak with a suspect does not automatically qualify as a seizure.

Commonwealth v. Raul Matta, 483 Mass. 357 (2019): On November 5, 2015, Holyoke police received a tip that there was a person who placed a firearm under the front seat of a black car. The caller reported that there were two females in the vehicle and that the vehicle was parked in an area known for violent crime, drug sales and shootings. After receiving this information, police arrived and noticed a dark green Honda parked on the street with two people inside. The police parked behind the Honda without activating emergency lights.

The defendant, Raul Matta, stepped out of the passenger seat and reached with both of his hands to the right side of his body to adjust his waistband and began walking. One of the officers said, **"Hey come here for a second."** The defendant immediately began to run away and the officer yelled **"Stop!"** A foot pursuit ensued and the officer chased the defendant who threw two plastic bags over a chain length fence onto a pedestrian walkway. When the defendant attempted to scale the fence, officers were able to apprehend him. The police arrested the defendant and found 129 baggies of heroin on his person. The defendant was charged with possession of heroin with intent to distribute (second offense) in violation of G. L. c. 94C, § 32 (b); and with committing the crime within one hundred feet of a public park in violation of G. L. c. 94C, § 32J (§ 32J), the "park zone statute." The defendant filed a motion to suppress which was denied. The defendant appealed after he was convicted and the SJC transferred the appeal on its own motion.

Conclusion: The SJC held that the police had reasonable suspicion to conduct an investigatory stop based on the information they had received from an anonymous tip and the observations of the police.

1st Issue: When was the defendant seized?

As part of its analysis in determining when the defendant seized, the SJC examined the standard that Massachusetts law has applied in other cases. The courts in Massachusetts examine the totality of the circumstances when determining whether a police officer has "engaged in some show of authority" that a reasonable person would consider coercive; that is, behavior "which could be expected to command compliance, beyond simply identifying [him-or herself] as police" ***Commonwealth v. Sanchez***, 403 Mass. 640, 644 (1988).

The primary issue in the present case was whether the officer, through words or conduct, objectively communicated that he would use his or her police power to coerce that person to stay. See ***Barros***, 435 Mass. at 175-176 (question is whether officer was "communicating what a reasonable person would understand as a command that would be enforced by the police power"). See also ***Terry v. Ohio***, 392 U.S. 1 (1968) (seizure occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen"). The actions of the police officer are critical when evaluating whether a person believes he or she is free to walk away from a police encounter, as compared to whether one believes he or she would be coerced to stay, is <u>not a distinction without a difference</u>. Police officers are free to make <u>non-coercive inquiries of anyone they wish</u>. See ***Commonwealth v. Murdough***, 428 Mass. 760, 763 (1999). Although in most situations, a reasonable person would not believe that he or she was free to leave during a police encounter, using that standard does not produce the information necessary to determine whether a seizure has occurred. Rather, t<u>he inquiry must be whether a reasonable person would believe that an officer would compel him or her to stay.</u>

Whether an encounter between a law enforcement official and a member of the public constitutes a non-coercive inquiry or a constitutional seizure depends upon the facts of the particular case. ***Commonwealth v. Thinh Van Cao***, 419 Mass. 383, 387, "The nature of an encounter between a citizen

and a law enforcement official is necessarily fact specific and requires careful examination of the attending circumstances"). The difference is one of emphasis — that is, even though most people would reasonably feel that they were not "free to leave" in any police encounter, the coercion must be objectively communicated through the officer's words and actions for there to be a seizure. See ***Barros***, 435 Mass. at 175-176.

In the present case, the SJC found that the seizure did not occur when the police officer called out, "**Hey, come here for a second,"** as the defendant began walking away from the officer, but rather when the defendant began to flee, and the officer ordered the defendant to stop running away. A direct command from a police officer to submit to his or her authority does not automatically effect a seizure. However, when an officer has "communicated what a reasonable person would understand as a command that would be enforced by the police power." ***Barros***, 435 Mass. at 176. The SJC has held that no seizure took place when an officer got out of his marked cruiser and said to defendant, "Hold on a second, I want to talk to you." ***Commonwealth v. Martin***, 467 Mass. 291, (2014).) In contrast, a seizure occurred after the officers persisted to speak with the defendant by issuing a subsequent order. See ***Jones-Pannell***, 472 Mass. at 431 (after defendant failed to respond to police requests, officer called out "Wait a minute".
The record in this shows that, at this point, the officer had made only one request, to speak with the defendant, had not activated his lights or sirens and therefore had not seized the defendant. Although the officer began walking toward the defendant, the officer did not "impede or restrict the defendant's freedom of movement." ***Barros***, supra at 174. For all the factors highlighted, the SJC held that the defendant was not seized at the point at which the officer first called out to him. The defendant was seized when the officer ordered him to stop, and then chased him.

2nd Issue: Did police have reasonable suspicion?

A number of collective factors support the SJC's finding that the police had reasonable suspicion to stop the defendant. The factors are listed below:

1. Officer's observations: At the time of the stop, the officer was aware of the anonymous tip regarding a concealed firearm in a motor vehicle in an area "known for violent crime, drug sales, and shootings." The officer observed the defendant get out of a vehicle, adjust the right front area of his waistband with both hands, and walk toward some bushes "not on the sidewalk, where one would expect a person to walk." When the officer called out to the defendant, the two looked at one another, and then the defendant began to run. Although the question is a close one, the circumstances existing at the time of the stop provided reasonable suspicion for that stop.

2. Adjustment of Waistband: Similarly, the defendant's adjustment of his waistband alone did not create reasonable suspicion for a seizure. It is not uncommon for anyone to adjust his or her clothing upon getting out of a motor vehicle. See generally ***United States v. Gray***, 213 F.3d 998, 1001 (8th Cir. 2000) ("Too many people fit this description for it to justify a reasonable suspicion of criminal activity"). However, the officer was credible when he testified that in his experience, people who carry unlicensed firearms often carry them inside a waistband, and that the officer became concerned that the defendant was carrying an unlicensed firearm when the defendant adjusted the right side of his waistband using both hands. In addition, the officer's concern was heightened when the defendant "began walking towards bushes, not on the sidewalk where one would expect a person to walk," and, when the officer called out to the defendant, the defendant began to run away, holding his waistband as he ran. "Nervous or furtive movements do not supply reasonable suspicion when considered in isolation," ***DePeiza***, 449 Mass. at 372; nor does seeking to avoid contact with police, However, those details could be combined with the other circumstances present

in this case in the reasonable suspicion calculus. ***Commonwealth v. Warren***, 475 Mass. 530, 538-539, (2016).

3. High Crime Area: The officer could consider the fact that the encounter took place in a high crime neighborhood. Although a designation of a high crime area alone is insufficient to justify a stop, if a particular area is known for "violent crime, drug sales, and shootings," that fact can be considered in the reasonable suspicion analysis. See ***Commonwealth v. Johnson***, 454 Mass. 159, (2009).

4. Flight: Finally, defendant's flight from the officer is a factor that may be considered in the reasonable suspicion calculus. See ***Sykes***, 449 Mass. at 314.

Considered in isolation, none of the above factors would have been enough to create reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime. However, taken together, the circumstances presented added up to reasonable suspicion.

3rd Issue: Did the pedestrian walkway qualify as a park as defined in G.L. c. 94C, § 32J?

The defendant makes three claims with respect to this conviction. First, he argues that §32J includes a scienter element as it pertains to the park zone provision and that there was insufficient evidence to prove the defendant knowingly violated the provision. Second, the defendant argues that the walkway onto which he threw the heroin was not a park within the meaning of the statute. Third, the defendant contends in a motion for a new trial that even if the walkway was a park under §32J, it was incorrectly identified in the indictment as Ely Court Park, which is a separate tract of land not adjacent to the walkway.

After review, the SJC concluded that with respect to the "public park or playground" provision of **§ 32J,** the intent to commit the underlying drug crime is sufficient, without additional proof of knowledge of park or playground boundaries required. However, whether an area of land is a public park under **§ 32J** is a question of fact and left for the jury to determine.

A. Field Encounters and Detentions

Field Encounters

Police officers are free to talk to anyone as long as there is no seizure and the person is free to leave.

Police can use mobile data terminals (MDTs) to verify a person's license information as long as the checks are random.

Commonwealth v. Murdough, 428 Mass. 760 (1999): Police can approach any parked vehicle to check on occupants without it turning into a seizure.

Commonwealth v. Stoute, 422 Mass. 782, 789 (1996): "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." A person is only seized by the police when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave. ***Id***. at 786.

Stop & Seizure

A field encounter becomes a stop or threshold inquiry when an officer uses authority to detain a person who is not free to leave. Some examples of a seizure include taking a person's identification, using an authoritative tone, physically blocking a person's path or activating blue lights.

A threshold inquiry that is based on reasonable suspicion does not automatically give police authority to conduct a frisk.

No set length of time has been designated to how long police can detain a person, but it must be reasonable under the circumstances.

Commonwealth v. Lyles, 453 Mass. 811 (2009): A threshold inquiry became a stop when police lacked reasonable suspicion to believe a crime was being committed and took Lyles' identification. The only information police had at the time was that Lyles was walking alone on a sidewalk near a housing project in Boston.

Commonwealth v. Pimentel, 27 Mass. App. Ct. 557 (1989): Police need to show some sort of authority in tone that would make an average person feel they were not free to leave in order for a seizure to occur.

Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998): Activating blue lights initiated a constitutional seizure where a police officer observed erratic driving and pulled up behind the vehicle to investigate whether the defendant was intoxicated.

Based on the totality of the circumstances, police lacked reasonable suspicion to stop the defendant and subsequently frisk him for safety concerns.

Commonwealth v. Chin-Clarke, 97 Mass. App. Ct. 604 (2020): Boston Police Officer Michael McHugh ("Officer McHugh") was in "plainclothes, walking beat" in the area of Boylston Street between Washington and Tremont Streets in downtown Boston. This area "is dominated by commercial properties and has heavy pedestrian foot traffic" and, by McHugh's description, is high in crime in that it is "frequented by a lot of people who sell and buy drugs, people who have drug problems, and that causes other problems. There are larcenies and robberies, shoplifting, assaults, public intoxication, trespassing that kind of thing." Officer McHugh had previously observed people selling or trading stolen items on the street and had made several arrests in the area for shoplifting. He described "numerous kinds of odd items in a bag," items "with the tags still on them," and "bags that might not be associated with the store that things were purchased from," as indicators of shoplifting.

Officer McHugh was near the St. Francis House, when he noticed three men, "looking in a plastic shopping bag and talking to each other." As Officer McHugh approached, he saw "that there was some clothing in the bag, and some of it was outside of the bag and it had tags." He heard one of the men ask how much an item was and he also saw a man later identified as Milton Noj, hold up some clothing. There were no security devices attached to any of the items in the bag, and he could not recall what store name was on the tags or on the bag. He was also unaware of any reports of shoplifting in the area that day. Officer McHugh approached the men and asked the men if the stuff was stolen. Noj appeared startled, said, "Whoa," and backed up. Officer McHugh identified himself as a police officer and told the third man to leave. Responding to McHugh, Noj initially stated that he had purchased the items in the bag at the Natick Mall.

When McHugh asked for receipts, Noj stated he did not have any and that his mother gave him the items.

Officer McHugh asked the defendant to remove his hands from his pockets and to "stand over there" against the exterior wall of St. Francis House. The defendant complied and showed Officer McHugh what was inside the bag. While Officer McHugh verified Noj's identification, he told him to stand facing the wall. At this time, the defendant, "appeared fidgety," "looked a little nervous," and "was looking up and down the street." When asked for his identification, the defendant relayed his name was "Dana Clarke" and a date of birth. The photography displayed a picture of someone who looked like the defendant. When McHugh asked the defendant for his Social Security number, the defendant said that he did not know it. Sometime during this conversation (it is unclear from the record precisely when), McHugh noticed that the defendant's hands were in his pockets and asked him to remove them. Although the defendant complied, "within a minute or two, he put his hands back inside of his clothing." Officer McHugh's uncertainty about the defendant's identity "gave [him] a heightened sense of concern that something might be wrong," and so he had the defendant and Noj sit on the ground and called for backup. Less than two minutes later, Officer Fabien Belgrave arrived at the scene and told the defendant to stand up so that he could get a better look at the defendant's face. The officers also had the defendant remove his hood and eyeglasses. Based on other images Belgrave found using the iPad, the officers ultimately determined that the defendant was not the Dana Clarke depicted in the driver's license photograph. As Officer McHugh reached out to handcuff the defendant, the defendant spun around, striking the other officer in the chest and causing all three men to fall to the ground. Both officers were able to handcuff the defendant. Another officer pat frisked the defendant and found a loaded firearm, nine bags of heroin, and twenty-three bags of "crack cocaine" in "a fanny pack that had been inside of [the defendant's] pants." The defendant was arrested and transported to the police station where, at booking, one hundred dollars in cash and a cell phone were inventoried.

Conclusion: The Appeals Court held that the police lacked reasonable suspicion and allowed the motion to suppress.

1st Issue: Did the police have reasonable suspicion to stop and patfrisk the defendant?

The Appeals Court held that the police lacked reasonable suspicion to detain the defendant and perform a patfrisk. There is not dispute that the defendant was seized when McHugh directed him to stand by the wall and asked for identification. When Officer McHugh told the defendant to stand by the wall and asked for identification, he knew the following facts: (1) Noj had a bag of clothes with tags on them; (2) the three men were looking in the bag; (3) one of the men said, "[H]ow much is this?"; (4) Noj held up an item of merchandise; (5) Noj gave arguably conflicting answers about the origin of the clothes; and (6) the defendant appeared nervous, had his hands in his pockets (at times), and was looking up and down the street. These facts do not give rise to reasonable suspicion that the defendant committed or was about to commit a crime.

The Commonwealth contends that Officer McHugh could rely on his training and experience to infer that the clothes were stolen, McHugh saw none of the signs of shoplifting "that he looks for," apart from the unremarkable fact that the clothes had tags. He could not recall any details about the items, what store brand was on the tags or on the bag, or whether there was a discrepancy between the brands. Although the clothes appeared to be new, this factor alone does not provide police with reasonable suspicion that the clothes were stolen. The time of a day in a heavily commercial area also raises diminishes the possibility that the clothes were stolen. ***Barreto***, 483 Mass. at 721 (movements consistent with drug transaction "were just as consistent with any number of innocent activities"). The Appeals Court determined that even if Officer McHugh deemed Noj's behavior to be unusual, there was nothing to suggest that the defendant

received or was about to receive any of the items knowing them to be stolen. The judge made no finding that the police saw the defendant accept any item or give Noj anything in exchange. To the contrary, the judge found only that the defendant was looking on as Noj held up some merchandise. ***Commonwealth v. Smith***, 55 Mass. App. Ct. 569 (no reasonable suspicion where officer "did not observe any actual transaction or furtive activity on the part of the defendant"). Additionally, Officer McHugh have any information that the defendant knew the clothes were stolen (assuming that they were). See ***Commonwealth v. Namey***, 67 Mass. App. Ct. 94. (crime of receiving stolen property requires knowledge that property was stolen and knowing possession). There were no security devices on the clothes or any other signs of theft. McHugh asked the defendant not one question relating to the clothes -- he did not ask, for instance, whether the defendant knew Noj or what the defendant was doing there. See ***Harris***, 93 Mass. App. Ct. at 62, (although officers were justified in approaching defendant to investigate possible bicycle theft, "importantly, over the next several minutes they learned nothing that could have added to their suspicions").

There are no other facts giving rise to reasonable suspicion. Officer McHugh did not know either the defendant or Noj. See ***Barreto***, 483 Mass. at 720 (no reasonable suspicion where, among other factors, "neither the defendant nor [the person with whom he engaged in suspected exchange] was known to the officers"). He was unaware that there were any shoplifting reports that might have added to the reasonable suspicion calculus. See ***Commonwealth v. Ellis***, 12 Mass. App. Ct. 476 (no reasonable suspicion where officer had no "independent information, such as a tip, that a crime was being committed" and "[t]here had been no report of a recent crime"). That the area is high crime did not justify the stop. See ***Narcisse***, 457 Mass. at 13. Additionally, the defendant's nervous demeanor, and McHugh's general "sense of concern that something might be wrong," also did not justify the stop. See ***Cruz***, 459 Mass. at 468 ("It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police"). In comparison to ***Terry v. Ohio***, Officer McHugh observed the defendant, in a span of a few seconds, do nothing more than look on as Noj showed him what appeared to be new clothes. A reed as thin as this does not support reasonable suspicion of criminal activity. Examining these factors collectively, the Appeals Court held that the stop was unlawful and that the evidence obtained during the subsequent patfrisk and at booking should have been suppressed as fruits of the poisonous tree.

- **TRAINING TIP:** The dissent emphasized the level and experience the police had and the numerous arrests the officer had made for shoplifting in the area. Additionally, the dissent focused on the fact that Officer McHugh was outnumbered and had concerns for his safety particularly when the defendant failed to comply with his orders and resisted as the officers attempted to handcuff him for safety concerns. Collectively, Officer McHugh was in a high crime area, saw the defendant engage in conduct consistent with the attempted purchase or sale of stolen goods; where the defendant refused to keep his hands out of his pockets and looked up and down Boylston Street; where the defendant gave a false name and date of birth and could not provide his Social Security number; and where the defendant was nervous and fidgety, Officer McHugh was justified in placing the defendant in handcuffs and conducting a patfrisk as a precautionary safety measure. See ***Pinto***, 476 Mass. at 363.

Frisks

Police may have reasonable suspicion that a crime has been committed, but in order to conduct a pat-frisk officers also need reasonable suspicion and evidence that a person is armed and dangerous. Reasonable suspicion can be derived from an officer's personal observations or information received via an informant or dispatch.

The exterior search of a suspect is conducted to find weapons: NOT to locate evidence.

Frisks are allowed: when a person is under arrest, there is an officer safety issue that a person may be armed or dangerous or a protective sweep of a house or vehicle. Frisks are limited in scope.

Commonwealth v. Narcisse, 457 Mass. 1 (2010): The SJC held that police cannot conduct a pat-frisk of person without reasonable suspicion. Although the defendant was present in a high crime area and police were concerned about retaliatory violence after the murder in Randolph, these general, environmental factors were not enough to suggest that the defendant was engaged in criminal activity or that he was armed and dangerous. Even considering these general "environmental" concerns, with the specific conduct of the defendant and his companion, the SJC concluded ***Terry*** prong was not satisfied. While such factors provided the officers with ample reason to approach the defendant to ask him about his business for being in the area, nothing the defendant or his companion did or said justified an escalation of the encounter.

Commonwealth v. Gomes, 453 Mass. 506 (2009): Although the stop of the defendant was justified by specific and articulable facts supporting an officer's belief that the defendant was engaged in drug activity, the circumstances did not warrant the pat-frisk of the defendant, as the police lacked particular facts from which a reasonable inference could be drawn that the defendant was armed and presented a danger to the police or others.

Commonwealth v. Flemming, 76 Mass. App. Ct. 632, 638 (2010): The defendant's cooperation and non-threatening movements failed to justify the police's decision "to lift the defendant's shirt without conducting a pat-frisk first."

Commonwealth v. McKoy, 83 Mass. App. Ct. 309 (2013): The Appeals Court held that based on the totality of the circumstances, the police had reasonable suspicion to conduct an investigative stop of defendant and his companion. The police had received a report that a person had been shot at a house one hundred (100) yards from where the defendant and his companion were walking; defendant and companion were only people on the street due to poor weather conditions and they were walking from the direction of the house where shooting had been reported. Lastly, the defendant dropped a large item to the ground when asked to remove his hands from his pockets, while his companion kept his hand in his pocket prior to fleeing from officers. Looking at the factors collectively along with good report writing were critical in this case.

Commonwealth v. Lyles, 453 Mass. 811 (2009): The SJC held that police acted on a hunch because they lacked reasonable suspicion. In ***Lyles,*** police officers stopped the defendant after they observed the defendant walking on a public sidewalk in an area known for drug activity. Since the officers did not recognize the defendant, they asked for his identification and checked for warrants. As soon as the police took the defendant's identification, a seizure occurred because he was not free to leave until the officers returned his identification and completed their investigation. The defendant in ***Lyles*** did not voluntarily provide his identification, but only turned it over after the police asked for it.

Commonwealth v. Fraser, 410 Mass. 541, 544 (1991): The SJC held it was reasonable for officer to ask the man to remove his hands from his pockets because the officer had concern for his safety. Officer Columbo had sufficient information to justify the protective frisk of the defendant. In sum, the judge found that Officer Columbo was confronted with the following situation. He had received a radio bulletin reporting there was a man with a gun. After hearing this report, Officer Columbo found a group of young

men at an identical location, which he knew to be a "high crime area." At this point the officers were outnumbered. Officer Columbo saw the defendant bend down behind a truck in a manner suggesting that he might be picking something up or putting something down. The defendant then approached the officer with his hands in his pockets. Examining all of these factors collectively, the Court held that there was enough to warrant and believe that a reasonably prudent person would be concerned for his safety or others.

Police lacked reasonable suspicion to believe suspect was armed and dangerous!

Commonwealth v. James Kearse, 97 Mass. App. Ct. 297 (2020): On March 2, 2016, Officer Leon was on patrol in an area of Dorchester, considered a high crime due to frequent stabbings, shootings, and drug activity. Officer Leon observed the defendant, James Kearse, with Domenic Yancy. A third male, "hopped a fence," and walked through a yard to meet the defendant and Yancy on the sidewalk. There was a quick interaction between Yancy and the male. They had a brief interaction which lasted less than two to three minutes. There was no interaction that took place between the defendant and the third male "and no additional evidence presented relating to any interaction between [the defendant] and Yancy either before or after the quick handshake. Believing that he had observed a hand-to-hand drug transaction between Yancy and the third male, Officer Leon radioed other officers to stop Yancy and the defendant. Patfrisks were conducted and no weapons or contraband were found. Officer Leon continued talking with Yancy.

The defendant was standing about twenty to twenty-five away and was moving in a way that suggested he may have a firearm on his person. Some of the observations the officer noted included that the pocket of the defendant's "coat was sagging as if it contained something heavy," that the defendant would "side-step" or reposition himself when an officer was near him, and that the defendant was "checking himself" by patting himself in a manner consistent with a person carrying a firearm without a holster. After making these observations, Officer Leon proceeded to pat frisk the defendant over the defendant's black puffy coat. Because he was unable to accomplish a patfrisk of the defendant due to his bulky layers, Officer Leon unzipped the defendant's coat and pat frisked over the defendant's sweatshirt. At this time, Officer Leon "felt a hard object that he immediately knew was the butt of a gun. [Officer Leon] lifted up the defendant's sweatshirt and saw a revolver."

The defendant was subsequently charged with carrying a loaded firearm without a license, G. L. c. 269, § 10 (n), carrying a firearm without a license as a second offense, G. L. c. 269, § 10 (a) & (d), and possession of ammunition without a firearm identification card, G. L. c. 269, § 10 (h) (1).

Conclusion: The Appeals Court held that the police lacked reasonable suspicion to believe that the defendant was engaged in criminal activity. Since the stop was unlawful, the patfrisk was also not permissible because the officer lacked reasonable suspicion to believe that the suspect was armed and dangerous." ***Commonwealth v. Torres-Pagan***, 484 Mass. 34, 36 (2020).

1st Issue: Did the police have reasonable suspicion to stop the defendant?

The Commonwealth did not dispute that the defendant was stopped, in the constitutional sense, when five to six officers stopped and pat frisked him in response to Officer Leon's radio broadcast. The Court must determine whether reasonable suspicion existed based on the information developed by police at that time. See ***Commonwealth v. Matta***, 483 Mass. 357, 360 (2019). The timing of the stop constrained the Court to exclude from consideration the crucial facts that Officer Leon later discovered Yancy was lying about his whereabouts before the stop and Officer Leon's later observation that the defendant

appeared to be carrying a gun.

Officer Leon outlined the facts that he believed gave him reasonable suspicion:

(1) during the afternoon hours an unidentified third male hopped over a fence and cut through a yard;

(2) Yancy and that male engaged in a "quick handshake" that Officer Leon believed to be a drug transaction while the defendant stood nearby, looked around, but did not interact with the third male or with Yancy; and

(3) after several minutes, the third male departed back over the fence and the defendant and Yancy walked back through Franklin Field Park.

A quick hand shake in a high crime area between individuals unknown to the police, even when viewed by an experienced investigator, standing alone, does not provide more than a hunch that a drug transaction occurred, and certainly no more than a hunch that a person standing near the individuals who engaged in the hand shake was a participant in criminal activity. See ***Meneus***, 476 Mass. at 238 (simply because activity occurred in high crime area does not for that reason mean that activity was suggestive of criminal activity; inference that criminal activity is underway must meet objective standard of reasonableness). As we observed in ***Commonwealth v. Ellis***, 12 Mass. App. Ct. 476, 477 (1981), "[t]here was no evidence to color the transaction." In ***Ellis***, we concluded that evidence that a police officer observed several people conversing through the window of the vehicle while it was in a parking lot, one of the individuals passing some paper money into the vehicle, and one of the occupants of the vehicle giving something to this individual, was not sufficient to constitute reasonable suspicion that a drug transaction had occurred. ***Id***. Similarly, in ***Commonwealth v. Clark***, 65 Mass. App. Ct. 39 (2005), a police officer driving past a bar observed a person he knew to be a bartender at a different bar walk over to the defendant, who was unknown to the officer. It was 11:20 P.M. in a high crime area. The officer saw the defendant hand "an unidentified item" to the other man, and then observed the defendant counting money. In concluding that these observations did not justify the subsequent stop of the defendant, we noted that "[a]part from the fact that the general area was known to be a high crime area, there is nothing in this record to suggest the officer had any specific information suggesting that a drug sale was likely to occur at this location." ***Id***. at 44. The facts before us in this case are distinguishable from other cases such as ***Commonwealth v. Kennedy,*** 426 Mass. 703, (1998), and ***Commonwealth v. Santaliz***, 413 Mass. 238, 241-242 (1992), in which justification for an arrest or a stop existed because "the 'silent movie' observed by an experienced narcotics investigator reveal[ed] a sequence of activity consistent with a drug sale." ***Commonwealth v. Freeman***, 87 Mass. App. Ct. 448 (2015).

It is not necessary in cases such as this that the police officer observe an exchange of items or actually see drugs or cash, but it is necessary that the observations by the police occur in a factual context that points to criminal activity. See ***Commonwealth v. Levy***, 459 Mass. 1010, 1011 (2011). Contrast ***Commonwealth v. Hernandez***, 448 Mass. 711, 714 (2007) (reasonable suspicion existed where, prior to shaking hands, police observed defendant pacing back and forth in high drug trafficking area before giving person item hidden in his shoe). Indeed, "other than the normal social intercourse that occurs with some frequency on the streets of Boston's neighborhoods, nothing [the officer observed] supports the claim of conduct consistent with a drug transaction." ***Commonwealth v. Ilya*** I., 470 Mass. 625, 631 (2015).

The fact that Officer Leon was an experienced drug investigator, while relevant to an assessment of reasonable suspicion, is not a substitute for details about how drug transactions occur based on that

experience. Compare ***Commonwealth v. Gomes,*** 453 Mass. 506, 511-512 (2009) (experienced drug investigator observed person who participated in hand-to-hand exchange of something also ingest something that was in his hand as police approached; officer explained that "drug dealers and users often ingested drugs to prevent the recovery of evidence"). Subjecting a quick handshake, without more, to the scrutiny of a nonconsensual police encounter is not consistent with the reality that "law-abiding citizens live and work in high-crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the character of the area." ***Id***. at 512.

In addition, we note that this is not a case where "the aggregation of otherwise innocent activities may give rise to reasonable suspicion." ***Commonwealth v. Stephens***, 451 Mass. 370, 385 (2008). Here, the third male's hopping a fence to meet Yancy and the defendant standing nearby did not meaningfully add to the calculus. Contrast ***Id***. at 384 (reasonable suspicion existed where defendants followed "'the precise script of the typical illegal narcotic transaction in that area of Lawrence: i.e., had met at a parking lot in an area known for illicit drug dealing and moved to a 'more remote location' to complete the illegal transaction"). Nor is this a case where a participant to the alleged drug transaction was known to police. Contrast ***Commonwealth v. Sanders***, 90 Mass. App. Ct. 660, 665 (2016) (concluding police officer could have inferred person who reached hand into vehicle window was engaged in drug transaction "with the addition of the remaining and critically important factor that the defendant was known to the officer as a person who previously had been arrested for distributing cocaine").

Contrast with ***Commonwealth v. Stewart,*** 469 Mass. 257, (2014) (reasonable suspicion existed where officer knew defendant had been arrested on drug distribution charge three years earlier in same area and observed "three persons follow the defendant down a narrow street often used by drug users, with [a] woman counting currency as she walked, and then all four huddled briefly together in a doorway, before they dispersed"); ***Freeman,*** 87 Mass. App. Ct. at 449 (probable cause standard established "based on the investigator's observation of two men on a street corner counting money, one of whom was known to be a drug user, the nature of the exchange that took place moments later between one of those two men and the defendant, and the location in which the events took place"). This case is close, but even less compelling than, ***Clark,*** 65 Mass. App. Ct. at 44, where an experienced officer witnessed the defendant, who was not a known drug dealer or user, standing outside a bar at approximately 11:20 P.M. in a high drug area. A different man, also not a known drug user, later came out of the bar and approached the defendant, who handed him "an item," and after which the defendant was observed counting money. ***Id.*** There, the SJC held that reasonable suspicion was lacking where, apart from the general high crime nature of the area, there was nothing "to suggest the officer had any specific information suggesting that a drug sale was likely to occur at this location" and "the officer did not suspect that criminal activity was afoot due to any furtive or unusual movements by the defendant or anyone else who interacted with him." ***Id***. at 44-45. Conversely, the encounter here took place in the afternoon and there was no observation of an item being passed, or money being counted.

While the police undoubtedly could have continued their investigation by way of continued observation or a field interrogation observation, see ***Commonwealth v. Murphy***, 63 Mass. App. Ct. 11, 17 (2005), an immediate, nonconsensual stop of this defendant was not constitutionally justified. Even if Officer Leon's observations were sufficient to constitute reasonable suspicion that the defendant was a participant in a drug transaction, there was no evidence at the point when he was first pat frisked to show that the defendant was armed. "The only legitimate reason for an officer to subject a suspect to a patfrisk is to determine whether he or she has concealed weapons on his or her person." ***Torres-Pagan***, 484 Mass. at 39.

Reasonable Suspicion to Conduct a Threshold Inquiry

Based on the description police had received and the location of where the defendant was found, police had reasonable suspicion to conduct a threshold inquiry.

Commonwealth v. Staley, 98 Mass. App. Ct. 189***,*** (2020): On November 7, 2017, a person robbed a Citizens Bank in Harvard Square. Police received a description of the suspect as a tall, thin, black male, aged fifty to seventy, wearing sunglasses and a black jacket. Cambridge Police Officers Charles McNeeley and Sean Norton were on foot patrol in when they received a dispatch about an armed robbery involving a gun along with a description of the suspect. Additionally, the suspect went to the Central Square MBTA stop because of its proximity to the Citizens Bank. Officer McNeeley learned that immediately after the robbery the police had stopped trains from leaving the Harvard Square station and he surmised that the train he saw entering the Central Square station had departed from Harvard Square just before that shutdown. Thus, Officer McNeeley ordered that the train be stopped.

Police walked through each train car to see if any of the passengers matched the description of the suspect provided by the dispatcher. The train was crowded and included a number of black male passengers. However, no one matched the description of the perpetrator until the officers reached the last car, where Officer McNeeley saw the defendant - a tall, thin, black male, between fifty and seventy years old, with a black jacket draped across his lap. Noticing that the defendant had a thin moustache and a goatee, Officer McNeeley called the dispatcher to get more information about the suspect's facial hair and he learned that the suspect "might have a thin moustache." Officer McNeely approached the defendant and asked him to step off the train. The defendant agreed and stepped off the train with the jacket draped over his arm. Officer McNeeley told the defendant that a bank robbery had occurred nearby, and that he matched the description of the robber. Officer McNeeley added: "If everything is okay, I will release you immediately and you will be on the next train to leave." During this exchange, Officer McNeeley noticed money sticking out of the pocket of the jacket.

Once on the platform, the officers conducted a threshold inquiry of the defendant. Due to safety concerns, Officer conducted a patfrisk and observed green papers sticking out of the left pocket. He also "felt a bulge" in that pocket. Police found inside the pocket dollar bills "neatly stacked and bound in packets." Officer McNeeley handcuffed the defendant and walked him up to the street. Unprompted by the officers, the defendant volunteered that he "jumped someone for the jacket in Harvard Square."

After a bench trial, the defendant, was convicted of unarmed robbery. He filed an appeal and argued that the motion to suppress should have been allowed under the principles outlined in the ***Warren*** case. The defendant contends that the description dispatch circulated about the suspect involved in the robbery was not detailed and that the officers lacked reasonable suspicion to stop the defendant and conduct a threshold inquiry. ***Commonwealth v. Warren***, 475 Mass. 530 (2016). The Appeals Court heard this case on further appeal.

Conclusion: Based on the description the police received and the proximity of where the defendant was found in relation to the crime, the Appeals Court held that the police had reasonable suspicion to conduct a threshold inquiry of the defendant.

Issue: Did police have reasonable suspicion to conduct a threshold inquiry of the defendant?

The motion judge concluded that Officer McNeeley's request that the defendant step off the train was

based on an objectively reasonable suspicion that the defendant perpetrated the robbery, because (1) he matched the description provided by the dispatcher, which was deemed sufficiently detailed to distinguish the defendant from other black males on the train, and (2) the officers encountered the defendant "close in time and distance to the crime." The motion judge further concluded that the officers acted reasonably by conducting the threshold inquiry on the platform.

A police officer may stop an individual and conduct a threshold inquiry if the officer reasonably suspects that such individual has committed, is committing, or is about to commit a crime." ***Commonwealth v. Mercado***, 422 Mass. 367, 369 (1996). "Reasonable suspicion may not be based on good faith or a hunch, but on specific, articulable facts and inferences that follow from the officer's experience." ***Commonwealth v. Grandison***, 433 Mass. 135, 139 (2001). The reasonable suspicion standard is an objective one.

Here the Appeals Court found that the description was not vague and had sufficient detail which distinguished this case from Warren. In ***Warren***, the police lacked any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics. ***Id***. The dispatcher provided "detailed information" about the perpetrator's facial features, skin tone, height, weight, age, and clothing. ***Commonwealth v. Barros***, 425 Mass. 572, 584 (1997). Contrast ***Warren***, where the victim described the suspects as three black males; two wearing "ubiquitous and nondescriptive 'dark clothing'" and one wearing a red "hoodie." The information related to the defendant was so detailed that police were able to eliminated every black male on the crowded train with the exception of the defendant. Contrast ***Commonwealth v. Cheek***, 413 Mass. 492, 496 (1992) (no reasonable suspicion to stop defendant where officers "possessed no additional physical description of the suspect that would have distinguished the defendant from any other black male in the area such as the suspect's height and weight, whether he had facial hair, unique markings on his face or clothes, or other identifying characteristics").

Apart from the description, the motion judge found that the defendant's presence on the only train leaving Harvard Square after the robbery was significant. ***Commonwealth v. Acevedo***, 73 Mass. App. Ct. 453, 458 (2009). The police's reasonable suspicion that the defendant was the suspect was not undermined by the fact that the robber was not described as wearing a hat, or that the defendant was not wearing sunglasses. Such items are easily worn, taken off, and discarded, and they have no bearing on the defendant's age, height, weight, skin tone, or facial hair. Based on all these factors, the police had ample reason to suspect that the defendant had committed the robbery and the police were acted lawfully and reasonably when they asked the defendant to step from the train in order to conduct a threshold inquiry.

B. Search and Seizure

Warrantless Searches

Commonwealth v. Jones-Pannell, 472 Mass. 429 (2015): This is a pivotal case that is repeatedly referenced when courts are examining whether police had reasonable suspicion during field encounters. The SJC highlighted a number of factors that were significant when determining whether police had reasonable suspicion. Police training and experience are critical when crediting the observations of a police officer that the suspect is likely carrying a firearm.

Reasonable Suspicion Based on Information from a Tip

Commonwealth v. Paris, 97 Mass. App. Ct. 785 (2020): On June 3, 2016, Detective Roberto Dacunha of the New Bedford Police Department received information from a confidential information that that two gang members had gone to the Central Kitchen which is located in a rival gang's territory. The CI relayed that Shazan Gilmette, a well-known gang member, was with another gang member who was described as a dark-skinned male with a white T-shirt. Based on the information he had re received, Detective Dacunha headed to Central Kitchen. On route, the detectives split up after receiving a second tip which indicated that the gang members had left in a gray Kia and were headed to a housing complex. The detectives found the KIA parked with its engine running a door ajar within the housing complex. Gilmette was standing on the sidewalk near the KIA and there were two other known West End gang members were on the grass nearby and neither of them were wearing white T-shirts. The defendant who had a dark complexion was within five feet of the KIA and was walking away as if he had purpose.

The police conducted a patfrisk of Gilmette for weapons and brought the defendant back to the grassy knoll with the group. All were read their Miranda rights and the defendant told police the KIA belonged to his grandmother. During a protective sweep of the motor vehicle police found a loaded revolver inside the vehicle's middle console. No one was arrested and the third officer arrived with additional details he had received from the CI. The dark-skinned male wearing a white T-shirt pointed a gun from the KIA at a people standing at Central Kitchen. Police arrested the defendant, who told them that the other gang members were a "bunch of bitches," and if he had parked the KIA around the corner, police would never have found the weapon. The was convicted of carrying a firearm without a license in violation of G. L.c. 269 s. 10 (a) can carrying a loaded a firearm without a license, G. L.c. 269 s. 10 (n) carrying a loaded firearm without a license and G. L.c. 269 s. 10 (h) can carrying a loaded a firearm without a FID card. The defendant filed a motion to suppress, which was denied.

Conclusion: The Appeals Court held that the CI's scant and vague information provided to police failed to rise to the requisite level of "specific, articulable facts" necessary to justify reasonable suspicion for the investigatory stop. Since the police lacked reasonable suspicion for the investigatory stop, all evidence obtained after that point, including the firearm and statements made to the police, should be suppressed.

Issue: Did police had reasonable suspicion to conduct an investigatory stop?

If police conduct an investigatory stop based on an informant's tip, the tip will have to be reliable. Police corroboration can make up any deficiencies with these factors. The Commonwealth alleges that the level of detail the CI provided to police demonstrated a strong basis of knowledge and the police's subsequent corroboration compensated for any deficiencies with the tip.

The Appeals Court found that the detectives effectuated the stop when they activated the cruiser's lights. When the police stopped the group, they were aware of two tips from the CI. The tip relayed that there were two gang-affiliated individuals with a gun at a restaurant located in rival gang territory, and that the two individuals left the restaurant without incident in a gray Kia heading south on Acushnet Avenue. Although the CI knew the full name of one of the individuals, he described the other as a "dark-skinned male with a white T-shirt. There CI did not mention that a man possessed the gun or described the gun, and there was no information what the two gang members were doing beyond heading south. The CI did not claim to have seen the gun or explain how they knew a gun was involved. See ***Commonwealth v. Aarhus***, 387 Mass. 735, 744 (1982) (precision of informant's tip can demonstrate reliability). The Commonwealth asserts that details from the tips, such as Gilmette's full name and gang affiliation, reflected

a familiarity with local gang culture sufficient to overcome the shortcomings. While (at least as to Gilmette) the information arguably was above the level that the average bystander could impart, the CI's tips "[did] not reveal any special familiarity with the defendants' affairs that might substitute for explicit information about the basis of the caller's knowledge." ***Lyons***, 409 Mass. at 20. Although the CI's name and address were known to police, the police had relied on information provided by the CI, and could not remember how he acquired the CI's contact information; the CI's reliability was therefore questionable. There was also no information regarding the CI's "reputation for honesty, or motivation." ***Mubd***i, 456 Mass. at 396.

The Commonwealth also asserts that the portions of the tips corroborated by the detectives were "highly unusual and suspicious" observations that "corroborated the essential message of the [CI's] tip –- that Gilmette and his comrade had a gun and were likely up to no good." Before the cruiser's blue lights were activated, detectives were able only to confirm the color and model of the vehicle, the involvement of Gilmette, and the location of the vehicle in West End gang territory. Compare ***Commonwealth v. Va Meng Joe***, 425 Mass. 99, 103 (1997) (where shortfall of credibility in tip provided by first-time informant was counterbalanced by "details of fairly specific information of the type not easily obtainable by a casual bystander"). These observations are closer to "obvious details" rather than "nonobvious details." ***Lyons***, 409 Mass. at 21. Moreover, the detectives at no time ever observed the two men mentioned by the CI together, much less together in the Kia. Lastly, assuming police were justified to approach the men who were outside of the KIA, there was no justification to search it. The patfrisk of the individuals did not turn up any evidence and none of the individuals made statements that would suggest a gun could be found inside of the KIA. Police conducted the search before receiving the CI's third tip and at no time did the police argue they were in fear of their safety.

Information Provided to Police Justified an Exit Order Due to Safety Concerns!

Commonwealth v. Bryan, 98 Mass. App. Ct. 238 (2020): Boston Police Officers Sean Daniely and Gregory Vickers were patrolling Blue Hill Avenue in the Mattapan in a marked cruiser at 1:30 A.M. on April 12, 2014, when they observed a minivan pull out from Ansel Road, near a nightclub (club), and turn left onto Blue Hill Avenue. Officer Daniely observed the minivan's headlights were not on, and it was moving slower than surrounding traffic. As the minivan approached an intersection, it suddenly jerked in the left lane without signaling. Officer Daniely stopped the vehicle after it made a U-turn. Officer Daniely has been involved in numerous traffic stops in the area of Blue Hill Avenue and Morton Street "where firearms were recovered," including "as recently as within a few weeks of this particular car stop." "There were also numerous past assaults via firearm, homicides via firearm. Officer Daniely observed the driver, Williamson, staring at him through the side mirror, and was concerned that "some sort of an attack on [him]" was being set up. Due to safety concerns, Officer Daniely activated his bright overhead lights and positioned his spotlight onto the minivan's side mirror in an attempt to blind Williamson.

Officer Daniely approached the minivan from the passenger side as a safety precaution and signaled for the passenger to lower the window. The passenger complied and Officer Daniely immediately noticed that Brown was not wearing a seat belt. The defendant also was not wearing a seatbelt. Officer Daniely told Williamson that he was stopped because his headlights were off. Officer Daniely asked for Williamson's license and registration. Officer Daniely was in the process of citing the driver and passenger for seatbelt violations when he smelled an odor of alcohol coming from the driver. The driver's speech was slurred, his eyes were red and glass and he "kept repeating himself." By contrast, Brown and the defendant "were sitting very stiff, like almost as if you're in the military sitting at attention, looking forward, not making any eye contact." Officer Daniely asked if there was anything in the vehicle that he should be concerned about,

"like, any guns, weapons, drones, bazookas, anything to kind of -- which usually gets a laugh out of people, kind of relaxes them." All three occupants "very abruptly" said "no."

Officer Vickers was working a paid detail on Morton Street when he saw the stop and walked over to the scene. Officer Daniely aske Officer Vickers to stand by the van while Officer Daniely assessed the driver's sobriety. Officer Daniely checked Brown's identification and learned that he "had a prior conviction for a firearm [charge]." While Officer Daniely was in the process of writing seat belt citations for the defendant and Brown he saw two security guards from the club cross Blue Hill Avenue and walk toward the scene "in a hurried type of manner." The security guards "kicked the occupants of the van out" of the club, and they watched them cross the street onto Ansel Road. A patron relayed that a person got into that van with a firearm." Officer Vickers shared the information with Officer Daniely and they removed the occupants from the minivan. Both officers conducted a pat frisk for weapons, because (1) "the front seat passenger ha[d] a firearm conviction," (2) "the two passengers were acting a little nervously," and (3) the officers "were just informed by two witnesses that there is a firearm in the vehicle."

While the police proceeded removing the occupants out of the van Officer, Vickers saw the defendant and asked him to stand up and get out of the minivan. The defendant "slowly got up and kind of like hovered above the seat." Officer Vickers saw a gun on the seat underneath the defendant's "buttocks area." All three men were removed from the minivan, pat frisked, and placed in handcuffs while Officer Vickers secured the loaded firearm. The club security guards stayed at the scene throughout the encounter and provided the police with their contact information. Neither Officers Daniely nor Vickers investigated the source of the club security guards' information.

The defendant filed a motion and argued that the police lacked reasonable suspicion to issue an exit order. Specifically, he claimed the officers had no basis of knowledge for the hearsay tip conveyed by the club security guards and no indicia of reliability, because "[n]obody bothered to speak to the individual that saw, allegedly saw the firearm." According to the defendant, after learning that Brown had a firearm conviction and one of the occupants may have a gun, the officers were required to determine whether any of the minivan's occupants had a license to carry a firearm and "take the time to speak to the individuals that reported the incident to the [club] security guards" before issuing the exit order. The motion was denied and the judge concluded that the police "acted reasonably in having these men get out of the vehicle for a pat frisk for weapons." The motion judge found that (1) the officers had an "overall concern about the particular neighborhood in the vicinity of Blue Hill and Morton," (2) Daniely observed what he perceived to be nervous behavior by the passengers and signs of intoxication by the operator, (3) the officers knew that one of the occupants had a prior firearm conviction, and (4) the officers received information that someone in the minivan had a gun. Collectively all of these circumstances warranted the officers in being concerned for their safety and the safety of the public."

A Superior Court jury convicted the defendant of unlawfully carrying a firearm and unlawfully carrying a loaded firearm in violation of G. L. c. 269, §§ 10(a) and (n), based on evidence that the defendant was sitting on a firearm that became visible after he was ordered out of a minivan for safety reasons. The defendant moved to suppress a firearm found during an exit order, arguing that the hearsay statements from nightclub security guards provided reasonable suspicion of the presence of a firearm in the vehicle. The exit order had been prompted, in part, by hearsay information communicated to the police officers at the scene that one of the occupants of the minivan had a gun. On appeal, the defendant claims that his motion to suppress the firearm should have been allowed because the hearsay information did not pass the two-pronged *Aguilar-Spinelli* test that is used to determine the veracity and basis of knowledge of an informant's tip. See ***Spinelli v. United States***, 393 U.S. 410 (1969); ***Aguilar v. Texas***, 378 U.S. 108

(1964). Therefore, the defendant claims, the police lacked reasonable suspicion to issue an exit order to him.

Conclusion: The Appeals Court held that the police were justified in issuing an exit order based on the specific, articulable facts that there may be a threat to the safety of the officers or the public.

The Appeals Court determined that the information the security guards provided to the police was a factor that was considered in the reasonable suspicion calculus. The content of the tip revealed to the officers the basis for the informant's knowledge, and the security guards stayed at the scene and were subject to identification. "The defendant has not cited to a case, and we have not found one, that holds that the *Aguilar-Spinelli* test applies to information relied upon by officers in deciding to issue an exit order for safety reasons. In the circumstances presented by this case, we hold that officers who receive, during the course of a justified traffic stop, a tip that someone in the stopped vehicle has a gun are not required to investigate and determine the reliability of the informant before issuing an exit order. 'Particularly' where, as here, the citizens who provided the police with information are standing alone next to a still-running vehicle, we believe the test for determining reasonable suspicion should include the government's need for prompt investigation. ***Commonwealth v. Stoute***, 422 Mass. 782, 791 (1996). Because we conclude that the intrusion on the defendant was justified by, and proportional to, the concerns for the safety of the officers and of the public, the motion to suppress was properly denied."

"[A]n exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." ***Commonwealth v. Torres-Pagan***, 484 Mass. 34, 38 (2020). The defendant claims that the exit order in this case was not justified because the Commonwealth failed to establish that the tip from the club security guards was reliable, and, without the tip, Daniely and Vickers did not have a reasonable fear for their safety. He further contends that the officers had no reason to suspect that a firearm was being possessed unlawfully or that the defendant was engaged in criminal activity separate from Williamson.

The Appeals Court did not need to decide whether the officers had reason to suspect the defendant was engaged in criminal activity separate from Williamson, because the police were concerned for their safety and the public's safety. This action was constitutional if the officers' concern was objectively reasonable and "grounded in specific, articulable facts and reasonable inferences [drawn] therefrom rather than on a hunch." ***Commonwealth v. Meneus***, 476 Mass. 231, 235 (2017). Here, Officer Daniely had stopped a minivan on a six-lane road at 1:30 A.M., for operating in an unsafe manner after apparently leaving a nightclub. Even though Officer Daniely feared for his safety before approaching the minivan, given (1) his knowledge of and personal involvement in recent stops in that area where firearms were recovered and (2) Williamson's stare, Officer Daniely's response to that fear was to activate his bright overhead lights, position his spotlight on the driver's side mirror, and approach from the passenger side as a safety precaution. He was also outnumbered by the occupants of the minivan "three to one," ***Commonwealth v. Moses***, 408 Mass. 136, 142 (1990); that the two passengers were not restrained by a seatbelt from reaching for anything within the minivan; and that the passengers were acting nervously, in Officer Daniely's estimation. Still, Officer Daniely did not issue an exit order. Instead, he returned to his cruiser. By his testimony, Officer Daniely did not even decide to issue an exit order after he learned that Brown had a prior firearm conviction. It was not until the two employees of the same nightclub relayed that someone had recently entered the minivan with a firearm on Ansel Road, where Officer Daniely first observed the minivan -- that the officers decided to issue an exit order. The exit order was objectively reasonable and supported by specific, articulable facts that there may be a threat to the safety of the officers or the public. By this

point in the encounter, Officers Daniely and Vickers were the only officers on scene with five civilians (three vehicle occupants and two security guards), in an area known to the have violence. Further, Williamson had been driving without headlights and somewhat erratically, and the minivan's engine was still running. The passengers, one of whom had a prior firearm conviction, were acting nervously while unrestrained by seatbelts. While the nervousness alone could not have justified the exit order, ***Commonwealth v. Torres***, 433 Mass. 669, 673 (2001), the officers had also learned from the club security guards that someone was seen on Ansel Road getting into the minivan with a gun. "[I]n combination with the [knowledge] of a suspected weapon" and the other factors just cited, we conclude that the nervous behavior "justified police concern for safety" in this case. Brown, supra at 534. This was "a swiftly developing situation," wherein events occurring in the course of the stop raised the officers' suspicion that the occupants of the minivan "posed a reasonable risk of harm to the officers or others." ***Commonwealth v. Hooker***, 52 Mass. App. Ct. 683, 686 (2001).

The Appeals Court has not found a case that holds that the *Aguilar-Spinelli* test applies to information relied upon by officers in deciding to issue an exit order for safety reasons. In the circumstances presented by this case, the Appeals Court concludes that officers who receive, during the course of a justified traffic stop, a tip that someone in the stopped vehicle has a gun are not required to investigate and determine the reliability of the informant before issuing an exit order. "Particularly" where, as here, the citizens who provided the police with information are standing alone next to a still running vehicle, we believe the "test for determining reasonable suspicion should include the government's need for prompt investigation." ***Commonwealth v. Stoute****,* 422 Mass. 782, 791 (1996). See ***Commonwealth v. Johnson***, 36 Mass. App. Ct. 336, 338 (1994) ("In a potentially volatile situation an officer should not be required to wait to see if a suspected gun is drawn. Where the officer is justified in making inquiry, the law is clear that he may take prudent precautions for his own safety or that of others"). Because we conclude that "[t]he intrusion on the defendant was justified by, and proportional to, the concerns for the safety of the officers and of the public," ***Torres***, 433 Mass. at 677, the motion to suppress was properly denied.

Validity of a Confidential Informant

The SJC holds the exit order in this case was unjustified based on the information the confidential informant provided to police.

- **NOTE:** This case was included in last year's in-service materials. The SJC heard the case on further appeal.

Commonwealth v. Barreto, 483 Mass. 716 (2019): Police received a tip from an undisclosed source that a green Volvo station wagon containing a "large" amount of narcotics would be located near a particular intersection in Boston. Police set up surveillance near the intersection after receiving information from the tipster. During the surveillance, police observed a Volvo station wagon approach the intersection, turn left without signaling**,** and park approximately fifty feet away.

The defendant was the only occupant in the vehicle and police saw him lean down and appear to reach toward the floor of the passenger side of the vehicle. An unidentified pedestrian approached the vehicle from a nearby apartment building. When the pedestrian reached the driver's window, the two men appeared to speak. The pedestrian leaned towards the vehicle and moved his arms "in a manner consistent with the two men exchanging something." The police did not see the hands of the two men come together during the thirty second interaction. The pedestrian returned to the apartment building appearing not to

have anything his hand. The defendant resumed driving for a short distance until officers signaled for him to stop. At this point, at least four officers and three police vehicles had arrived. When engaged by two of the officers, the defendant avoided making eye contact.

Officers observed that the defendant was breathing heavily and looking in his rear and side view mirrors at the officers and vehicles behind him. An officer issued an exit order to the defendant. As the defendant got out of his vehicle, the officer saw what appeared to be a roll of cash inside a clear plastic bag in the storage compartment of the driver's side door. The police conducted a patfrisk and found nothing. A drug-sniffing dog arrived on scene and alerted his handler to the passenger seat where a metal box containing cocaine and cash were found. The defendant was charged and filed a motion to suppress all the evidence that was seized from his vehicle. The judge denied the motion even though the Commonwealth did not provide any information demonstrating that the informant was truthful. The judge found that the police had reasonable suspicion to stop the defendant and issue an exit order based on the police's observations of the defendant and the man. When the police saw the rolled cash, they had probable cause to conduct a subsequent search of the vehicle. The defendant filed an appeal and the issue the Appeals Court had to consider was whether the exit order was valid.

Conclusion: The SJC held that the exit order was not lawfully issued and therefore the evidence obtained from the subsequent search should have been suppressed as fruit of the poisonous tree. See ***Wong Sun***, 371 U.S. at 486-488.

1st Issue: Did police have reasonable suspicion to believe the defendant was involved in a drug transaction?

There is no dispute the police had justification to stop the defendant's motor vehicle based on the motor vehicle infraction the police observed. However, based on the facts of the case, the police lacked reasonable suspicion to believe the defendant was selling drugs. After receiving information for the confidential informant, police enhanced patrols in the area. The information received from the tip was only used to provide context to explain why police were in the area. Since the information from the tip was used for a limited purpose, the reliability of the tip was never established. Without that piece, the issue was whether the observations of the police alone provided police with reasonable suspicion to believe a drug transaction had occurred.

In the underlying case, police observed the defendant turn onto a residential street without using a left-hand turn signal. At some point an unknown male left a nearby building and walked towards the defendant's vehicle. The defendant leaned down to his right as if he were reaching toward the floor by the front passenger seat. The defendant sat back and the unknown male leaned toward the vehicle as if he were reaching into the vehicle. The entire interaction with the unknown male lasted less than thirty seconds. The defendant drove off while the man returned the residential building. The police had no prior knowledge that the defendant or man were known for drug activity. There was no information that area where the defendant stopped his motor vehicle was known for high drug activity. The area where the stopped occurred was described as a "relatively quiet residential street." The police only observed the driver lean towards the passenger-side floor and have a brief interaction with an unknown male party. As the Appeals Court noted what the police saw could be consistent with a "broad range of other interactions," including a driver asking for directions or stopping to say hello. There was insufficient evidence to establish that an exchange of illegal drugs had occurred. Police only had a mere hunch that a drug transaction had occurred which is insufficient to establish reasonable suspicion. ***Commonwealth v. Silva***, 366 Mass. 402 (1974). The SJC concluded that the police lacked reasonable suspicion to believe the defendant involved in a drug

transaction.

2nd Issue: Was the exit order lawful?

The police lacked reasonable suspicion to order the defendant out of his vehicle. An exit order is not constitutionally justified based solely on a traffic violation. See ***Commonwealth v. Amado***, 474 Mass. 147, 151 (2016). An exit order can only be justified based on events or observations made by the officers after they stopped the defendant's vehicle. When police observe a traffic violation, an exit order been stopped for an observed traffic violation, an exit order to a driver or passenger can be valid, "(1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds. See ***Amado***, 474 Mass. at 151-152. The circumstances in this case do not suggest that there were any safety concerns or reasonable suspicion of criminal activity once police stopped the defendant. When the defendant was pulled over, police observed that he was breathing heavily, he avoided making eye contact when answering questions, and he appeared nervous. He also looked in his rear view and side view mirrors at the several police officers and vehicles that had arrived. At the same time, the defendant responded to the officers' questions, complied with all requests, and made no movements consistent with reaching for a weapon after he was stopped. These facts do not suggest a concern for safety.

The defendant's behavior after the stop did not provide the requisite suspicion of unlawful activity to justify an exit order on that basis. See ***Amado***, 474 Mass. at 151-152. The only additional information that police had after executing the stop that they did not have prior to the stop was the fact that the defendant appeared to be nervous and avoided eye contact while conversing with police. "It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police." ***Commonwealth v. Cruz***, 459 Mass. 459, 468 (2011). Given that police did not have reasonable suspicion prior to the stop, the sole additional fact that the defendant appeared nervous after the stop cannot create reasonable suspicion. See ***Commonwealth v. Torres***, 424 Mass. 153, 161 (1997) All these factors together fails to provide reasonable suspicion. The SJC found that there was not valid basis for exit order due to safety concerns. Furthermore, police lacked reasonable suspicion to believe the defendant was involved in criminal activity. Without a valid exit order, the evidence should be suppressed.

Controlled Buy in Multi-Unit Building

In order to establish an informant's veracity during a controlled buy within a multi-unit building, police may need to provide more information than simply monitoring the controlled buy from the exterior of an apartment building!

Commonwealth v. Ponte: 97 Mass. App. Ct. 78 (2020): After receiving information from a confidential informant ("CI"), New Bedford Police Detective Kevin Barbosa applied for a warrant to search an apartment in New Bedford. The CI was an admitted drug user who had personally purchased cocaine from the defendant, "Joe Ponte" at apartment 2F in the past. The CI was familiar with terminology related to cocaine purchases, including packaging and street level sales. However, the affidavit did not include information about the CI's track record or prior history nor did it indicate what the CI's history had been with the police department. The affidavit did contain information the CI had provided to police within the past thirty days. The CI was concerned the defendant would retaliate if the CI's identity were disclosed. The affidavit stated that the CI provided Detective Barbosa with the defendant's telephone number and stated that the number had been used to arrange to buy cocaine. The CI described the process when he purchased cocaine from the defendant and he gave a description of the defendant. With the description of the defendant, police

were able to find a photograph of the defendant and confirm with independent information where the defendant lived. The defendant's board of probation record showed twenty-nine adult arraignments, which included narcotics offenses and charges of assault and battery by means of a dangerous weapon.

The police arranged a controlled buy, using the CI, whom they watched as he entered the front of the building. The police did not see the CI interact with anyone before or after the buy, and the affidavit failed to demonstrate that the CI purchased the drugs from apartment 2F. The police met with the CI after the buy and retrieved the substance the CI had purchased from the defendant in apartment 2F. A subsequent search of the CI revealed that the only difference between the two searches was that the CI no longer had the money for the buy.

The defendant was charged and filed a motion to suppress. The Commonwealth filed an interlocutory appeal challenging whether a controlled buy of narcotics from an apartment within a large multi-unit apartment building, in which police observe a confidential informant (CI) enter and leave the building, but do not observe which apartment the CI approaches to complete the purchase, is sufficient corroboration of the CI's veracity to satisfy that prong of the *Aguilar-Spinelli* reliability test.

Conclusion: The Appeals Court held that the search warrant affidavit attached to the search warrant failed to establish probable cause since it did not specify which apartment in a multi-unit building the CI went into to conduct a controlled buy and whether police observed it.

1st Issue: Was there sufficient corroboration of the CI's veracity to satisfy that prong of the *Aguilar-Spinelli* test?

Under the *Aguilar-Spinelli* analysis, the Commonwealth must establish the reliability of the CI, by establishing the CI's basis of knowledge and by demonstrating that the CI's information was credible or reliable, known as the veracity test. ***Commonwealth v. Depiero***, 473 Mass. 450, (2016). Independent police corroboration may make up for deficiencies in one or both prongs of the *Aguilar-Spinelli* analysis. ***Id.***

In the present case, the basis of knowledge prong of the *Aguliar-Spinnelli* test was satisfied by the informant's statement that it purchased drugs from the defendant inside the apartment. With respect to the informant's veracity, there was insufficient corroboration to establish the veracity of the confidential informant. Although the informant's "identity" and "whereabouts" were known to the police, these facts alone do not confirm the CI's reliability. ***Commonwealth v. Alphonso A.***, 438 Mass. 372, (2003). The affidavit was missing information related to the CI's prior history with the police department. See ***Commonwealth v. Monteiro***, 93 Mass. App. Ct. 478, (2018). The CI's statement to the police that he had purchased and used cocaine in the past also failed to establish the CI's veracity. Verifying innocent details that the CI provided about where the defendant lived did not suffice. See ***Commonwealth v. Mubdi***, 456 Mass. 385, (2010) (corroboration only of "innocent facts" like location of vehicle and number of passengers does not establish CI's veracity).

As to the defendant's relevant criminal history, the affidavit detailed arraignments for drug possession and distribution, but nothing more. "[T]he magistrate was told no details about the purported arrest[s], including when [they] occurred, whether charges were brought, whether contraband was seized, or the ultimate disposition of the arrest[s]." ***Commonwealth v. Reyes***, 423 Mass. 568, (1996). See ***Desper***, 419 Mass. at 167 (convictions of "uncertain vintage" given no weight in probable cause determination). Contrast ***Depiero***, 473 Mass. at 457 ("the fact that [the officer] was informed that the defendant was on probation for the same type of criminal activity of which he was suspected further

corroborated the anonymous call"). The above details do not establish the CI's veracity.

2nd Issue: Was the controlled buy within a multi-unit apartment building sufficient corroboration to establish the CI's veracity?

Based on the facts of this case, the Appeals Court determined that the police's observations of the CI approaching an apartment within a multiunit apartment building was insufficient to satisfy the veracity of the CI. Generally, "[a] controlled purchase of narcotics, supervised by the police, provides probable cause to issue a search warrant." ***Commonwealth v. Warren***, 418 Mass. 86, (1994). When there is a controlled buy, an affidavit must provide enough context and details that the police properly supervised the controlled buy and that the evidence was reliable. See ***Id.*** at 90-91. In ***Desper***, 419 Mass. at 168, the Supreme Judicial Court set forth the minimum essential components of a controlled buy:

(1) a police officer meets the informant at a location other than the location where [it is] suspected that criminal activity is occurring;

(2) the officer searches the informant to ensure the informant has no drugs on his person and (usually) furnishes the informant with money to purchase drugs;

(3) the officer escorts or follows the informant to the premises where it is alleged illegal activity is occurring and watches the informant enter and leave those premises; and

(4) the informant turns over to the officer the substance the informant has purchased from the residents of the premises under surveillance.

If the police fail to comply with one of the four minimum investigatory steps, probable cause may still be established where the aggregate of information is sufficient for the magistrate to conclude that the CI was credible. ***Monteiro***, 93 Mass. App. Ct. at 483-484.

The defendant argued that the controlled buy was insufficient since the police only saw the informant enter and exit the apartment building and did not observe the CI approach or enter apartment 2F. In prior cases involving a multi-unit building, courts have not required that the police observe the informant enter the particular apartment where the transaction is reported to have occurred to demonstrate the informant's reliability." ***Warren***, 418 Mass. at 90 ("It is not fatal to the warrant application that the police did not observe which of the three apartments the informant entered. Based on the information provided by the informant and their own observations, the police could infer that the defendant was dealing drugs from his second-floor apartment"). "[T]he police were not required to risk disclosure of their surveillance by observing the apartment in a small multi-apartment building an informant actually enters in the course of executing a controlled buy." ***Desper***, 419 Mass. at 169. "The ***Warren*** case involved a three-story building with three apartments. When dealing with large buildings, a reasonable inference could be made that the CI in fact purchased drugs from the apartment unit in question. ***Id.*** The question is hether the same holds true for larger multi-unit buildings.

In this case it was unknown how many units were in the building and the evidence suggests that the building was significantly larger than three or four units. The affidavit described the unit as a six-story building. Here, the affidavit was not a model of completeness, and it did not provide sufficient detail about the supervision of the controlled buy. Without more information, the Appeals Court cannot infer details without expanding the holding of ***Warren***.

Despite the deficiencies, the Appeals Court does not "purport to prescribe a bright-line rule with

respect to the required level of detail of police observations of the particular unit within a multiunit apartment building from which a controlled buy is made, or the force of circumstances justifying some degree of uncertainty in a particular case." However, an affidavit must provide sufficient details with respect to the attendant circumstances surrounding the controlled buy. Some examples include the following:

- the layout of the building
- the number of apartments,
- the location of the defendant's apartment,
- the details of the interior of the apartment,
- where the defendant stored the drugs in the apartment, and
- the feasibility (or unfeasibility) of observing the CI enter a particular apartment (and not another apartment) to conduct the controlled buy — in order to justify a conclusion that the CI in fact purchased drugs from the apartment unit the CI named.

In the circumstances of a controlled buy, police observation of a CI entering and exiting a large multi-unit building containing a large number of individual apartments on multiple floors, without more, does not sufficiently corroborate the CI's veracity."

"The corroborative value of the controlled buy and the adequacy of police supervision of that buy lessens when the number of apartments in a multiunit building increase." Although the affidavit neglected to include the number of units in the building it indicated that there were six floors. The Appeals Court surmised that there may have been as many as 30 units in the building and stated "if the purpose of the controlled buy is to test the accuracy of the CI's information, the more units there are in a building, the less potency the controlled buy has in corroborating the claim as to one particular unit if the controlled buy is not monitored appropriately."

- ❖ **TRAINING TIP**: Adding the defendant's criminal record with the search warrant affidavit along with a detailed description of the dwelling may also help.

Factors Relevant for Drug Transaction

Commonwealth v. David Santa Maria, 97 Mass. App. Ct. 490 (2020): On January 21, 2014, in the early afternoon, Officer Patrick Moran ("Officer Moran") was conducting surveillance in the parking lot of a Mobil gas station at the corner of Houghton and Grafton Streets in Worcester. Officer Moran had extensive training and experience in narcotics investigations and had participated in thousands of arrests stemming from street-level drug activity. Based on his experience, Officer Moran knew the drug transactions are common in the Mobil parking lot and recently Worcester police had received complaints from citizens that street-level drug dealing was occurring in these locations.

Officer Moran was parked in an unmarked cruiser in the Mobil Gas station when he saw a man park his Chevrolet Cruze next to him. The driver of the Cruze went to the store and going returned to sit in is car. A short time later, a pickup truck arrived and parked directly in front of Officer Moran the Cruze. Officer Moran found this unusual, since there were numerous parking spots available. The driver of the truck who was later identified as Darron Andrews, a codefendant met with the driver of the Cruze who also got out of his car. From his vantage point. Officer Moran observed the pair make a "quick hand to hand" exchange of an item through the truck's driver's side window. Officer Moran believed that he had observed an illegal drug transaction and he noticed the Cruze's driver "looking at something in his hand" as he walked back to his car. Based on his training and experience, Officer Moran noted that "people who are purchasing drugs,

often look at what was purchased to make sure, one, they didn't get a beat bag; and that they got the right amount for what they just paid."

After the exchange, Andrews drove his truck to the Honey Farms parking lot, while the Cruze drove away. Officer Moran told fellow officers what he had observed. The police were unable to follow the driver of the Cruze but continued to watch Andrews. Andrews remained in his truck in the Honey Farms lot, while the defendant, driving a gold colored sport utility vehicle (SUV), entered the lot and parked. Like Andrews, the defendant did not enter any of the nearby stores. Rather, he got out of the SUV, walked over to Andrews's truck, and sat in the passenger seat. At this point, Officer Moran believed that a drug transaction was about to take place, and he gave the order to approach the truck. Within approximately seconds police surrounded Andrews's truck. Officer Moran announced that he was a Worcester police officer, opened the door, and ordered Andrews out of the truck. Andrews was holding cash ($297) in his hand. Andrews got out of the truck, and Moran patted him down and found eleven packets of heroin and "crack" cocaine in his shirt pocket. At the same time the defendant was ordered out the passenger seat. He failed to comply and began thrusting his hand towards his waistband. Due to safety concerns, police physically removed the defendant from the truck. A struggle ensued. The defendant was searched, after spitting blood at one of the officers. Police recovered a plastic bottle of oxycodone from his waistband. Both the defendant and Andrews were arrested.

The defendant was charged and he filed a motion to suppress. The motion was denied and on the grounds that the police had reasonable suspicion to believe the defendant had sold drugs when he was in the Mobil Gas station, and when he entered Andrews's truck. Ultimately, the judge concluded that probable cause existed, and the pills found on the defendant were not suppressed. The defendant was convicted of assault and battery on a police officer (G. L. c. 265, § 13D), possession of oxycodone (G. L. c. 94C, § 32A [a]), and resisting arrest (G. L. c. 268, 32B). He filed an appeal and the primary issue before the Appeals Court was whether the officers had properly arrested the defendant and whether the search was proper.

Conclusion: The Appeals Court held that the police had probable cause to search the defendant and that the oxycodone was properly seized.

1st Issue: Did police have probable cause to believe a drug transaction had occurred?

Probable cause exists when police know of "enough facts and circumstances 'to warrant a person of reasonable caution' in believing that the defendant had committed or was committing a crime." Id., quoting ***Commonwealth v. Gullick***, 386 Mass. 278, (1982). "In dealing with probable cause we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Brinegar v. United States***, 338 U.S. 160, 175 (1949). Here the police had probable cause to believe that Andrews had just engaged in a drug transaction with the Cruze's driver. "[I]n ***Commonwealth v. Santaliz***, 413 Mass. 238, (1992), the Supreme Judicial Court set forth a nonexclusive list of factors that, when taken together, support a ruling that there was probable cause to search a person in the context of a suspected street-level drug transaction."

The ***Santaliz*** factors are "(1) the observation of an unusual transaction; (2) furtive actions by the participants; (3) the event occurs in a location where the police know drug transactions are common; and (4) an experienced officer on the scene regards the event as consistent with a street-level drug transaction." ***Id.*** at 661. Police observed an apparent hand-to-hand exchange between Andrews and the Cruze's driver, in an area (the Mobil lot) known for drug transactions, and an experienced officer on the scene, Moran, believed that he had witnessed a drug sale.

The evidence with respect to the transaction is slightly stronger than in ***Kennedy***, where it merely "appeared to the officer that something was exchanged." ***Kennedy***, 426 Mass. at 704. Even in ***Kennedy***, it was found that given the easily concealed nature of small packages of drugs, an officer need not actually see an object exchanged in order to have probable cause. See ***Id***. at 710-711. Here, Officer Moran saw the Cruze's driver "looking at something in his hand" as he walked back to his car, consistent with a buyer of drugs checking to make sure he received what he paid for. This provided the requisite "factual support for the inference that the parties exchanged an object." ***Commonwealth v. Stewart***, 469 Mass. 257, (2014). The fact that Cruze's driver examined the object in his hand as he returned to his car, rather than openly while still engaged with Andrews, supports an inference of the exchange of contraband, in which the participants would want to complete the transaction as quickly as possible and limit their contact with each other in public to the minimum necessary.

There were two other issues the Appeals Court addressed. The first issue concerned whether the police observed any furtive actions between the defendant and Andrews. According to Officer Moran, the transaction was extremely quick. Andrews did not even park in a space, instead stopping in front of two parked cars and leaving immediately afterwards. "The quickness of the interaction reasonably could be interpreted by the officer as suspicious conduct, similar to the suspicious conduct of the 'furtive' transaction observed in the ***Santaliz*** case." ***Kennedy***, 426 Mass. at 708-709. The second issue is whether the defendant or Andrews had a "reputation in the community as a drug dealer." ***Id.*** at 710. Although reputation can be factor when considering whether police have probable cause, the courts have consistently "avoided an overly formulaic approach" to determining probable cause in this area. ***Sanders***, 90 Mass. App. Ct. at 660. "Probable cause, after all, is a fact-intensive inquiry and must be resolved based on the particular facts of each case." ***Commonwealth v. Long***, 482 Mass. 804, (2019). The police had probable cause, prior to the defendant's arrival on the scene, to believe Andrews was selling drugs out of his truck.

2nd Issue: Was the exit order lawful?

The Appeals Court held that the police could lawfully order Andrews out of the truck, both (1) to search and arrest him, and (2) to search the truck under the "automobile exception" for evidence of drug transactions. It was also reasonable for police to order the defendant out of the truck, regardless of whether the police had probable cause to believe that he was engaged in a drug transaction. Even if "the police initially had no basis to do more than order the defendant to exit the vehicle while they performed a search of the vehicle's interior for evidence of the crime of [Andrews's] arrest, the defendant's behavior in response to the exit order changed the nature of the encounter." ***Id***. at 555. The defendant failed to comply with the officer's order and he thrust both hands toward his waistband. These circumstances combined with what police already knew and had observed established probable cause to search the defendant for evidence of a drug transaction. The defendant's motion to suppress the drugs found in his waistband during that search was properly denied.

Protective Sweeps

The factors considered to justify a protective sweep are as follows:

1. "the violence implicit in the crime for which the defendant is sought and the violence implicit in his criminal history," ***Commonwealth v. DeJesus***, 70 Mass. App. Ct. 114, 119 (2007);

2. the location of the arrest in relation to the area to be swept, ***Commonwealth v. Colon***, 88

Mass. App. Ct. 579, 581-582 (2015);

3. the defendant's resistance or cooperation at the time of arrest, ***Commonwealth v. McCollum***, 79 Mass. App. Ct. 239, 251 (2011); and,

4. the presence, or at least the suspicion of the presence, of other individuals, including those known to be dangerous, in the area, ***Commonwealth v. Nova***, 50 Mass. App. Ct. 633, 634-636 (2000).

5. The sweep must last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."

The quantum of proof necessary to conduct a protective sweep is **reasonable suspicion**, not probable cause. Police must possess a reasonable belief based upon specific and articulable facts which, together with reasonable inferences from those facts reasonably warrant the officers in believing that the area swept harbored an individual posing a danger to the officers or others. The violent nature of the crime charged by the arrest and the suspect's criminal history can provide the articulable facts justifying a protective sweep.

Another basis for police to conduct a protective sweep upon executing a valid arrest in a dwelling for a serious crime, may involve searching the premises if they possess "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." ***Maryland v. Buie***, 494 U.S. 325, 337 (1990). The Commonwealth does not read ***Maryland v. Buie*** "to require necessarily that the findings of 'articulable facts' justifying a protective sweep be separate from the violence implicit in the crime for which the defendant is sought and the violence implicit in his criminal history." ***Commonwealth v. DeJesus***, 70 Mass. App. Ct. 114, 119 (2007).

The search "may extend only to a cursory inspection of those spaces where a person may be found," and may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." ***Maryland v. Buie***, 494 U.S. at 335-336. ***Commonwealth v. Cruz***, 53 Mass. App. Ct. 24 (2001). The searching officers must have a reasonable basis for believing that a dangerous individual is hiding on the premises; the mere presence of a third party does not justify a protective sweep. ***Commonwealth v. Dubois***, 44 Mass. App. Ct. 294, (1988).

The scope of the protective sweep extends into closets as well beneath furniture "immediately adjoining the place of arrest from which an attack could be immediately launched." ***Maryland v. Buie***, 494 U.S. at 334. ***Commonwealth v. Mejia,*** 64 Mass. App. Ct. 238 (2005) (police did not exceed the proper scope of a protective sweep by ripping a mattress from a bed in a frantic search for accomplices to a kidnapping); ***Commonwealth v. Lopes***, 455 Mass. 147 (2009) (police had reasonable grounds to conduct a protective sweep of a large passenger van in which an additional suspect might have easily hidden himself).

Commonwealth v. McDermott, 448 Mass. 750, (2007): Securing the premises often overlaps with protective sweeps. In this case, exigent circumstances existed following a mass murder that occurred at the defendant's place of employment. The SJC held that police were justifying in entry the defendant's

residence without a warrant to look for homicide victims. Police limited their entry to areas where persons could be found. No items were picked up or removed from the house.

Commonwealth v. Arn Jones, 98 Mass. App. Ct. 120 (2020): Salem police received a 911 call from Chris Gray who indicated that he believed that his girlfriend was being held inside their apartment against her will, and he did not know if she was all right. Police set up a perimeter around the apartment building. Gray met the police at the back door and identified himself. He told police that there were four men with weapons inside the second-floor apartment and that he thought his girlfriend was passed out in the bedroom and may be in distress. Three officers knocked on the front door of the second-floor apartment and several times announced, "Salem Police."

With no response, and with authorization from the sergeant in command to force open the door, the officers did so. The police entered into the kitchen, where one man was present. The sergeant announced that officers had a dog with them that would be entering the apartment. Two other men then entered the kitchen from a separate room. The police immediately handcuffed and pat frisked for weapons for the officers' safety. No weapons were found on any of them. Again, the defendant raises no issue with respect to these seizures or searches. Gray's girlfriend came out of the bedroom after the three men had been handcuffed and pat frisked. Officers described Gray's girlfriend as a little out of it and that "she kind of didn't know what was going on." She appeared to be unharmed and said she was "okay."

At some point, a fourth man, later identified as Arn Jones, the defendant, appeared at a glass window in the back door of the building. One of the officers told him to open the door, but he ducked down and police lost sight of him. The police know began searching and the hallways and the basement in the building. After making sure there was no one in the basement, the officers worked their way up the stairwell, checking apartment doors on the way up. They were all locked. When one of the officers was heading up the stairwell, he saw the defendant sitting in the stairwell. He instructed the defendant to come down, and the defendant complied. The officer handcuffed the defendant and brought him back to the apartment where the three other men were handcuffed and Gray's girlfriend was present.

At this point police "checked all the rooms" in the apartment in order to "make sure nobody else was hiding." During that protective sweep, in addition to some paperwork with the defendant's name on it, the police saw some narcotics on a futon and some other paraphernalia in plain view "on the nightstand, on the floor." Items discovered during the protective sweep formed the basis for a subsequently obtained search warrant.

There was no issue raised by the defendant about the search warrant, apart from whether it was the fruit of the allegedly improper protective sweep. The defendant was ultimately convicted of possession with intent to distribute a class B substance, G. L. c. 94C, § 32A (a), possession with intent to distribute a class D substance, G. L. c. 94C, § 32C (a), and a school or park zone violation, G. L. c. 94C, § 32J. The defendant argued that a motion to suppress the fruit of a protective sweep of a second-floor apartment in a building in Salem should have been allowed because the protective sweep was improper.

Conclusion: The Appeals Court held that the protective sweep was permissible under the "emergency aid" doctrine, a "narrow exception" to the warrant and probable cause requirements. ***Commonwealth v. Duncan***, 574 U.S. 891 (2014).

The Appeals Court held that the emergency aid exception applies when officers enter a dwelling to provide emergency assistance. ***Id***. at 749-750. There is no dispute that the officers had a sufficient basis

for believing that there was an ongoing emergency based on the detailed information that had received from Charles Gray who was present. See ***Commonwealth v. Atchue***, 393 Mass. 343, 347 (1984). "[T]he conduct of the police following the entry must be reasonable under the circumstances," ***Duncan***, supra at 750, and the officers' authority is "'strictly circumscribed' by the circumstances of the emergency that justified entry." ***Commonwealth v. Arias***, 481 Mass. 604, 612 (2019).

Here, the police had information that there might be armed men holding a woman in an apartment against her will. The police had "an objectively reasonable basis to believe" that the emergency continued because there might be an armed individual hidden somewhere in the apartment, a protective sweep of the apartment, limited to what was necessary to see if there was a person hiding, was permissible. ***Arias***, 481 Mass. at 612. The emergency continued because police had only found three men when they entered the apartment and not four as Gray had reported. The fourth man, the defendant, was never seen in the apartment, but only in a back hall and on the stairway. Perhaps he had been in the apartment, but it is possible he had been outside it in the stairwell, hallways, or basement the entire time. The police therefore had a reasonable basis, even after the defendant's apprehension, for a continued reasonable belief that there might be an armed individual hiding somewhere in the apartment. Additionally, the girlfriend's statement that she was okay does not diminish the fact that she appeared "out of it," a person threatened with harm by a hidden man with a weapon obviously might be instructed to say something false to the police in order to get them to leave the apartment. Given the information provided by Gray, it was therefore reasonable for the police to complete a protective sweep of the premises, despite the statement by Gray's girlfriend, to ensure that there was no threat to her from apartment.

Exigent Circumstances

- **TRAINING TIP:** The exigent circumstances exception is broader than emergency aid and typically requires a showing of probable cause where that is not required in emergency aid situations because they are not entering the house to investigate criminal activity. See ***Commonwealth v. Entwistle****,* 463 Mass. 205, 214–215, (2012).

Destruction of evidence along with flight of suspects is sufficient to justify the warrantless entry into a home under exigent circumstances!

Commonwealth v. Ramos, 470 Mass. 740 (2015): The SJC concluded that the police entry into the garage was justified based on the exigency that evidence was being destroyed. "Exigencies which may justify a procedure without warrant are a narrow category and must be established by the Commonwealth which bears the burden of proof." ***Commonwealth v. Young***, 382 Mass. 448, 456 (1981). Among the exigencies providing justification for a warrantless entry into a home is an officer's reasonable belief that the entry is necessary to prevent "the potential loss or destruction of evidence." ***Commonwealth v. DeJesus,*** 439 Mass. 616 , 619 (2003).

The SJC rules that art. 14 provides greater protection than the Fourth Amendment where the police relied on a reasonably foreseeable exigency to justify making a warrantless entry into a dwelling to arrest an occupant.

Commonwealth v. Alexis, 481 Mass. 91 (2018): The SJC concluded that because there were no exigent circumstances authorizing the officers' warrantless entry into the defendant's home, the entry was unlawful and evidence found in plain view during the protective sweep was suppressed. The SJC also determined that

under art. 14 the police cannot avail themselves of the exigency exception to the warrant requirement when it was foreseeable that their actions would create the exigency, even if their conduct was lawful." ***Commonwealth v. Alexis***, 481 Mass. at 99-100.

Emergency Aid Exception

Parameters of the Emergency Aid Exception in Massachusetts:

Police can enter a home without a warrant if they have a reasonable basis to believe the following:

1. *someone inside is injured or*

2. *is in imminent danger of physical harm*.

Emergency aid does not require police to have probable cause to enter a home because the purpose for entry is not to investigate a crime, but to avert danger.

1. Domestic Violence

Commonwealth v. Gordon, 87 Mass. App. Ct. 322 (2015): Police can enter the inside of a home without a warrant if they have an objectively reasonable basis to conclude that the person who asked for police assistance may be inside the apartment and in need of emergency aid.

2. Protection for Animals

Commonwealth v. Duncan, 467 Mass 746 (2014): The SJC held that in "appropriate circumstances, animals, like humans, should be afforded the protection of the emergency aid exception and would allow police "to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm." Despite its findings, the expansion of the *emergency aid exception* does not change "the essential framework for determining when a warrantless police search of the home is permissible under it." Police must adhere to the strict requirements under the *emergency aid exception* whether dealing with humans or animals. The two key requirements are listed below:

1. An objectively reasonable grounds to believe that an emergency exists

2. Police conduct must be reasonable under the circumstances after gaining entry

Additionally, ***Duncan*** established that some factors that should be considered when determining whether a 'pure emergency' exists for animals. Before entering a home without a warrant to assist animals in need, police should consider the factors listed below:

a. Was the animal's condition caused by human abuse or neglect?
b. What kind of species was the animal in need?
c. What was the nature of the privacy interest at issue?
d. What efforts were made to obtain the consent of the property owner prior to making entry onto the property?

e. How significant was the intrusion and was there any damage done to the property?

There are no definitive guidelines that cover every scenario involving animals but the SJC advised that when determining whether the search is reasonable, it will look at the "totality of the circumstances." Here, the police found two animals deceased and frozen to the ground in the front yard of Duncan's home. Police also noticed that there was no food or water outside and the third dog was whimpering and leashed outside in cold temperatures. All of these factors would suggest that the third dog was in imminent danger based on the conditions that the police found it.

3. Serving Warrant of Apprehension at a Home

Hill v. City of Taunton, 884 F. 3d 16 (1st Circuit 2018): The First Circuit had to consider whether a section 35 warrant, or any other warrant to compel attendance at a civil commitment hearing, is sufficient to justify a law enforcement officer's warrantless entry into the home under the emergency aid exception. The First Circuit acknowledged that the rule was not clearly established. As part of its examination, it examined the emergency aid exception, as outlined by the Supreme Court in ***Michigan v. Fisher***. According to the Supreme Court's holding in that case, the government does not need to establish probable cause, but only "an objectively reasonable basis" for believing that a person inside the home is in need of immediate aid, in order to enter the home without a warrant. Under this standard, the First Circuit found that given Matthew's history of overdosing and resisting the police, the subject line of the warrant (3 Eldridge Street), and the appearance of a person inside the home, a reasonable officer could have reasonably concluded that his entry was lawful under the emergency aid exception.

4. Standard for Entering a Home

Commonwealth v. Jose Arias, 481 Mass. 604 (2019): The SJC held that an emergency aid exception did not apply because an emergency did not exist and police lacked an objectively reasonable basis to believe that a home invasion was in progress, or that some type of safety risk was posed to potential victims inside the apartment. Here, the SJC found that the police did not have an objectively reasonable basis to believe an emergency existed. Although officers do not need an ironclad proof of a likely, serious, life-threatening injury in order for an entry, it must be reasonable. The entry is made "to prevent harm stemming from a dangerous condition, not to investigate criminal activity." ***Commonwealth v. Tuschall,*** 476 Mass. 581, (2017). When police arrived on scene after receiving the 911 call, they saw and heard no signs of disturbance, and detected no signs of forced entry. The doors to apartment 5A were closed and intact. Furthermore, the 911 caller relayed that the men had entered the building "easily." Other residents in the multi-unit dwelling indicated they had not seen or heard anything suspicious or out of the ordinary. There were no sounds coming from apartment 5A. Although police observed a man matching the description at the back of the building, their observations did not transform the situation into an emergency. There was no indication that the man was injured, in need of emergency assistance, armed, or about to harm others, or that he had harmed others. Regardless of whether the officers had sincerely held beliefs as to the existence of an armed home invasion or hostage situation, their subjective beliefs at the scene cannot justify a search under the emergency aid exception. The circumstances at the time of entry here did not establish a reasonable basis to believe that an emergency existed in unit 5A. See ***Tuschall***, *supra* at 585-587. Based on all the facts, the warrantless search of the dwelling was not justified under the emergency aid exception.

Issue: Did police have probable cause and exigent circumstances to enter the apartment without a warrant?

"In the absence of a warrant, two conditions must be met in order for a nonconsensual entry to be valid" under the ***exigent circumstances exception*****:** (**1**) "there must be probable cause" and (**2**) "there must be exigent circumstances." ***Commonwealth v. DeJesus***, 439 Mass. 616, 619 (2003). Essentially, when probable cause exists to believe that a crime has occurred, is occurring, or will occur imminently, a warrantless entry is justified only if exigent circumstances also are present. For exigent circumstances to exist, police must have "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances. ***Commonwealth v. Figueroa,*** 468 Mass. 204, 213 (2014). Impracticability arises in the context of the exigent circumstances doctrine when the delay caused by obtaining a warrant would create "a significant risk" that "the suspect may flee," "evidence may be destroyed," or "the safety of the police or others may be endangered." ***Commonwealth v. Tyree***, 455 Mass. 676, 685-691 (2010).

The SJC first concluded that there was no exigency and that police lacked objectively reasonable grounds to believe that residents of apartment 5A were in danger. When police arrived on scene, there were no indications of violence or forced entry into apartment 5A. The police also were unaware that a resident or victim inside apartment 5A was in danger. None of the residents from apartment 7A had seen or heard anything suspicious. Although the police saw one of the defendants at the rear of the building, there was no indication that he, the police, or anyone else was at risk of imminent injury. Furthermore, the police had surrounded the building which certainly minimized the risk of the suspect fleeing. Based on the facts of this case, the SJC found that police lacked a reasonable basis to believe that there was an armed home invasion or hostage situation or another exigency. The investigation of a crime, even a serious crime such as an armed home invasion, does not itself establish an exigency. See ***Mincey***, 437 U.S. at 394

The SJC also concluded that the police did not have probable cause to believe criminal conduct was at hand because they did not find any corroborating evidence to bolster the 911 caller's reliability. After reviewing the circumstances, the police encountered at the scene, the SJC found that the caller provided conflicting information. Initially, the caller reported that she saw two men "going up to the building" located at the specified address, and that she heard one of the men load the gun before he and his companion entered the building. Later, the caller said there were three men. The caller also commented that the men talked calmly before entering the building, which they entered "easily" because they likely had a key. Although the caller said that she had never seen the men before, she acknowledged that she was new to the neighborhood and was unsure of what the men were doing. The caller's description of the men who left the building also conflicted with the description the caller had provided to the police. When evaluating all the factors present in this case and the lack of independent, corroborating evidence from police, the reliability of the 911 caller's testimony was insufficient to establish probable cause under art. 14.

Consent Searches

A. Standard for Actual v. Apparent Authority

In Massachusetts, the Courts have addressed some of the complex issues surrounding consent in a few cases. The SJC found in ***Commonwealth v. Porter, P.*** 456 Mass. 254 (2010), that the shelter director did not have authority to allow police to search the juvenile's room because this was equivalent to a home for the juvenile and his mother. Although the shelter director had a master key and could enter the room "for professional business purposes" it did not diminish the legitimacy of juvenile's privacy interest in the room. The Massachusetts SJC declared that under ***Article 14 of the Massachusetts Declaration of***

Rights, a person may have actual authority to consent to a warrantless search of a home by the police only if:

> (1) the person is a co-inhabitant with a shared right of access to the home, that is, the person lives in the home, either as a member of the family, a roommate, or a houseguest whose stay is of substantial duration and who is given full access to the home; or
>
> (2) the person, generally a landlord, shows the police a written contract entitling that person to allow the police to enter the home to search for and seize contraband or evidence. No such entitlement may reasonably be presumed by custom or oral agreement." *Id*. at 264-265.

Furthermore, the SJC in ***Porter*** imposed two additional requirements on police when consent to search is given under the common authority.

> "First the police officer must base his conclusion of actual authority on facts, not assumptions or impressions. He must continue his inquiry until he has reliable information on which to base a finding of actual authority to consent.
>
> Second, the police must not only thoroughly question the individual consenting to the search with respect to his or her actual authority, but also pay close attention to whether the surrounding circumstances indicate that the consenting individual is truthful and accurate in asserting common authority over the premises." ***Id***. at 271- 272.

Porter clarified that a person must have actual or apparent authority over the premises in order to give consent for police to enter the home or residence. In addition to the owner of the property giving consent, a person who has common authority and mutual use over the property such as a co-tenant may also give police consent to search. However, a co-tenant's authority may be limited only to common areas to be searched. As noted in ***Georgia v. Randolph***, 547 U.S. 103, 112 (2006), "when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on the premises as an occupant may lack the perceived authority to consent." It is important to understand that that a co-tenant cannot give police consent to search over the objection of another co-tenant.

B. Scope of Consent Searches

Commonwealth v. Fernando Santos, 465 Mass. 689 (2013): The SJC held that the search of the premises in ***Santos*** was lawful based on the mother's apparent authority. **Santos** established that if it is unclear who resides in the house and there are no exigent circumstances, police can ask who has authority over the premise prior to entering. In **Santos,** the SJC found that it was reasonable for police to enter the home first floor apartment without asking if she had authority based upon the actions of the victim's mother. Once inside the apartment, police observed the grandmother, who lived there and never objected to police entering her home. Based on the facts in Santos, it was reasonable for police to reasonably conclude that the mother, third party, had apparent authority to give consent for entry into the home. If "police are faced with contrary facts tending to suggest that the person consenting to the search lacks actual authority, police have a duty of further inquiry." "Absent those contrary facts or 'surrounding circumstances [that] could conceivably be such that a reasonable person would doubt its truth,' an officer's conclusion that he has consent to enter a premises, if based on 'facts, not assumptions or impressions,' may satisfy the first of the two-part inquiry of due diligence."

- **TRAINING TIP*:*** Below are some questions can police ask for clarification as to whether a person has authority to consent to search.

1. Ask if the person authorizing entry into the home has authority over the premises?

2. . Based on the facts or circumstances, is it reasonable to conclude that the person authorizing entry into the home has actual or apparent authority over the premises?

The mother lacked apparent authority to consent to police searching her adult daughter's separate apartment in a two-family home.

Commonwealth v. Richard Santos, 97 Mass. App. Ct. 719 (2020): On July 25, 2016, Holyoke police officers arrived at a residence on Brown Avenue to execute a warrant to commit the defendant, Richard Santos, for inpatient care due to his substance use disorder. Officer James McGillicuddy who was not involved in execution of the warrant, came to the home after learning that the defendant may have knowledge about a recent shooting and could be carrying a handgun for protection. Officer McGillicuddy spoke with the mother outside of the two-family home with an apartment on each of the first and second floors. The defendant's mother told the officer that she owned the house, and that she and her husband lived in the second-floor apartment, while her daughter lived in the first-floor apartment. Although the defendant did not reside at the home, he would sleep on his sister's couch with his mother's permission. The police believed that mother was the landlord.

Officer McGillicuddy asked the mother if she would consent to a search of the daughter's first-floor apartment. After reviewing a written consent form, the mother signed it. The police then conducted a search of the daughter's apartment. A backpack that the mother said belonged to her son was recovered. Police found sixteen bullets in a sock inside of the backpack, a gun under a mattress and loaded magazine in a dresser drawer. The defendant appealed sought to suppress the handgun and loaded magazine seized. The defendant filed a motion to suppress challenging the mother's authority to consent to the search. A judge allowed the motion and the Commonwealth appealed and argued that the mother had apparent authority to consent to the search.

Conclusion: The Appeals Court affirmed the allowance of the motion to suppress and held that since the facts were ambiguous the police had a duty to explore rather than ignore, contrary facts that the mother lacked actual authority to consent to the search. The Appeals Court further held that there is no parental exception to this rule.

The proscription of the Fourth Amendment to the United States Constitution against unreasonable searches and seizures and the protection of art. 14 of the Massachusetts Declaration of Rights are not violated when a warrantless entry into a home "occurs after a police officer obtains the voluntary consent of a person he reasonably believes, after diligent inquiry, has common authority over the home, but it turns out that the person lacked common authority." Apparent authority is "judged against an objective standard: would the facts available to the officer at the moment warrant a person of reasonable caution in the belief' that the consenting party had authority over the premises?" ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). Following the guidance outlined in ***Porter***, an officer must make "diligent inquiry which consists of two steps: first, 'the police officer must base his conclusion of actual authority on facts, not assumptions or impressions,' and second, 'even when the consenting individual explicitly asserts that he lives there, if "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth," the police officer must make further inquiry to resolve the ambiguity.'" See ***Porter P.***, at 271-272. "The police officer owes a duty to explore, rather than ignore, contrary facts tending to suggest that the person

consenting to the search lacks actual authority." ***Id***. at 272. Not only should the police question the person concerning their "actual authority, but also pay close attention to whether the consenting individual is truthful and accurate in asserting common authority over the premises." ***Id.***

Additionally, ***Porter P***. requires that in determining if a person has authority to consent to a search, police should consider the following:

(1) the person is a cohabitant with a shared right of access to the home, that is, the person who lives in the home, either as a member of the family, a roommate, or a houseguest whose stay is of substantial duration and who is given full access to the home; or

(2) the person, generally a landlord, shows the police a written contract entitling that person to allow the police to enter the home to search for and seize contraband or evidence. No such entitlement may reasonably be presumed by custom or oral agreement.

In ***Commonwealth v. Lopez***, 458 Mass. 383 (2010), the SJC illustrates the duty of a police officer to explore the authority of the person consenting to entry into a home where police were seeking a hotel manager at his room and instead encountered a woman who opened the door to the room. The court held that the police had not gained legal consent to enter the room where the woman who gave consent was not known to them and her relationship to the premises was uncertain. ***Id***. at 395-396. The SJC rejected the argument that police did not have a reason to think the woman did not have authority. Rather, "it required that the Commonwealth must prove that there were facts affirmatively known to the officer that would permit him reasonably to believe that the person giving consent had authority over the premises." The SJC also held that the police could not assume without further inquiry that a person who answers the door to a home has the authority to let them enter.

When police are confronted with an emergency situation, they have more leeway. For example, in ***Santos***, the officers were responding to an emergency call to an address that gave only a street address but no apartment number, they were greeted on the porch by a woman who identified herself as the 911 caller, she indicated that a child who had been sexually assaulted was inside the apartment, and the woman opened the front door and led the police through two open doors into the apartment where the child was waiting. ***Santos***, 465 Mass. at 696. The apartment belonged to the child's grandmother and the mother lived upstairs in a separate apartment. ***Id.*** at 691. It would have been "best practice for police, prior to entry, simply to ask who is the resident of the home, but was "an ongoing emergency," and the police "relied on sufficient, unambiguous facts to conclude that they had consent to enter the premises." ***Id***. at 697.

In the present case, police knew that the mother's authority to consent to the search were that (1) the defendant's mother owned the two-family house and lived in the second-floor apartment; (2) her adult daughter lived separately from her mother in the first-floor apartment; and (3) the mother occasionally gave permission for the defendant to spend the night in the daughter's apartment and limited him to sleeping on a particular piece of furniture. Based on all these factors, the Commonwealth argued that it was reasonable for police to infer the mother could consent to search a portion of a house she owned "in which her offspring either lived or periodically visited."

The SJC did not agree with the Commonwealth's contention and determined that further inquiry was required. The information the police had was ambiguous. The police knew the mother did not live in the apartment to be searched and could not give authority as a resident. The officer did not know what the agreement was between the mother and the daughter concerning this separate apartment, including

whether this was a typical landlord-tenant relationship or there was some other agreement. These facts were not sufficient to allow the officer to form a reasonable conclusion that the defendant's mother had the requisite authority to consent to the search of her daughter's apartment. The officer had a duty to explore this with a simple inquiry. ***Porter P***., 456 Mass. at 272. While a parent may validly consent to a search of a room occupied by an adult child within the parent's home, see, e.g., ***Commonwealth v. Ortiz***, 422 Mass. 64, 70 (1996), and ***Commonwealth v. Farnsworth***, 76 Mass. App. Ct. 87, 97 (2010), there is no authority for the proposition that a parent who resides in one apartment in a multi-family dwelling may authorize a search of a child's physically separate apartment in the dwelling. This was a separate apartment in which the mother allowed her adult daughter to reside, with all other attendant circumstances unknown. The police could not ignore this fact.

Based on the facts of this case, who had authority to consent to search was ambiguous even though the mother sometimes gave permission for her son to stay in the apartment on the couch. As a general matter, leases may limit guests. See ***United Co. v. Meehan***, 47 Mass. App. Ct. 315, (1999). However, the police knew there were reasons why this mother (and putative property owner) might require that this man, even if he was her child, obtain her permission to stay at or visit her property, even in another apartment. The police and the mother were aware that the defendant was involved in drugs and may also be armed with a handgun for self-protection due to a recent shooting. Lastly, the mother's comment that she sometimes allowed her son to sleep on the couch in the daughter's apartment did not indicate that had control over her daughter's apartment. For all these reasons, the motion to suppress is affirmed.

Eyewitness Identification

Commonwealth v. Germain, 483 Mass. 553, (2019): One night in June 2015, a restaurant owner in Lawrence, left work with her wait staff around 3:00 AM. As the women waited for the taxicab, a man approached to within a few feet and said "Give me everything." The man pulled out a firearm when the women failed to respond. The man appeared to focus on one of the women who was holding a purse, a cellular telephone, and a laptop computer. The woman threw everything at the man. One of the women, identified as Maria ran away and used her phone. The other two women, Jeannie and Ruth walked across the street with the man following them and demanding their property. A group close by started yelling at the man and he fired his weapon towards them.

Ruth and Jeannie started walking toward the police station, in the opposite direction from the robber. The taxicab driver, who had circled the block, picked them up nearby. They all drove back to the restaurant to attempt to retrieve Jeannie's property, and encountered the defendant, who was walking down the street. He fired the weapon twice in their direction, while Ruth was speaking to 911 dispatchers. The taxicab left with Carolyn and Jeannie while Maria and Ruth head to the restaurant to meet police.

Lawrence police searched the area for a Hispanic male wearing a black hooded jacket. Officer Ryan Guthrie heard gunshots from a few blocks away, encountered two parked taxicabs on a street corner. The taxicab drivers directed Officer Guthrie to a nearby park. Officer Guthrie saw a man in a black jacket, later identified as the defendant, walking south of the park**.** The man was the first pedestrian Officer Guthrie had encountered during his search. Officer Guthrie attempted to stop the defendant who was removing his jacket and then began running away. Another officer apprehended the defendant and recovered Street a single round of .45 caliber ammunition in the defendant's pants pocket. After being advised of the Miranda rights, and without prompting, the defendant said, "It wasn't me, it was the other guy." He added that if the officers uncuffed him, he would tell them who it was.

Officer Guthrie headed to the restaurant to interview Maria and Ruth. Ruth described the robber as a Hispanic man in a black hooded jacket and both witnesses said that they could identify the suspect if they saw him. Officer Guthrie instructed Maria and Ruth that the police had a man in custody, that they did not know if he was the robber, and that they needed the witnesses to tell them whether or not he was the robber. Officer Guthrie wanted to transport Maria and Ruth separately to see the defendant where he was being detained for purposes of a show up identification. Officer Guthrie advised the witnesses that he intended to transport them one at a time, in the rear seat of his police cruiser. Both protested. Due to their fear of the suspect, they wanted to be together, and asked for assurances that the individual would not be able to see them. Ultimately, Officer Guthrie acquiesced and drove with both Maria and Ruth in the rear seat. The defendant was standing in front of a wall, handcuffed, and amidst several police officers. Officer Guthrie illuminated the area with the spotlight of his cruiser. Before Guthrie could pose a question, Maria and Ruth simultaneously identified the defendant as the robber, Maria in English, and Ruth in Spanish, in words to the effect of, "That's him." When asked about their level of certainty, Maria told Guthrie she was one hundred percent; Ruth, as translated by Maria, said the same thing. The identifications took place within ten minutes of the initial police dispatch. The defendant was indicted on one count of armed robbery, G. L. c. 265, § 17; three counts of assault by means of a dangerous weapon, G. L. c. 265, § 15B (b); and carrying a firearm without a license, G. L. c. 269, § 10 (a), and later convicted. He appeals his conviction arguing that the police allowed the two witnesses to participate in the show up identification together, and because the officers did not provide the witnesses with adequate instructions prior to the show up identification

Conclusion: The Court held that the show up identification was not ideal, but was not unnecessarily suggestive.

Show up identifications are typically disfavored but are not necessarily impermissible if conducted in the immediate aftermath of a crime. ***Commonwealth v. Dew***, 478 Mass. 304, (2017). "Suggestiveness alone is not sufficient to render a show up identification inadmissible in evidence" ***Commonwealth v. Crayton***, 470 Mass. 228, (2014). Under both the Fourteenth Amendment to the United States Constitution and art. 12, a defendant seeking suppression of a show up identification must establish by a preponderance of the evidence that the procedure was unnecessarily suggestive. If an identification procedure was unnecessarily suggestive, yet nonetheless was reliable in the totality of the circumstances, it may still be admissible. Under the more protective requirements of art. 12, an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification is per se excluded. ***Commonwealth v. Johnson***, 473 Mass. 594, 597 (2016).

1st Issue: Were the police justified in not separating the two victims during the show up identification?

Despite best practices, the police had little choice in this case because the witnesses were scared and refused to be separated. The officer intended to separate the witnesses and made a good faith effort to do so. The witnesses, however, "balked at [the officer's] request to be transported one at a time to view the suspect in custody." They requested to stay together because they were "scared," and "didn't want the suspect to see them." The witnesses told police that they were fearful of identifying the robber and did not want to be seen. Other percipient witnesses, including the two other wait staff, left the area before officers had an opportunity to speak with them. Maria described her employees as "shaken up," and added that one had been so frightened that she vomited. The taxicab driver, another percipient witness, was never located, as the taxicab company declined to track down or provide any information about which drivers were working in the area that night.

2nd Issue: Was the identification procedure unnecessarily suggestive because police failed to follow the Silva-Santiago protocol?

The SJC held that any identification procedure that does not follow the ***Silva-Santiago*** protocol is not automatically unnecessarily suggestive. In the ***Thomas*** case, the SJC did not find that the failure to provide a percipient witness with an instruction prior to the show up identification renders any show up identification inadmissible. ***Commonwealth v. Thomas***, 68 N.E.3d 1161. Here, Officer Guthrie provided the witnesses a critical part of the ***Silva-Santiago*** identification instruction prior to the show up identification. As the record reflected, Officer Guthrie informed the witnesses "that the police had a man in custody, that they did not know if he was the robber, and that they needed the witness to tell them whether or not he was the robber." This statement served to counteract any perception that the police were "directing the witnesses to confirm a police determination of the suspect's culpability."

3rd Issue: Should the protocol for Silva-Santiago be expanded to require that the instruction be given prior to identification?

The SJC held that going forward, it would be prudent to require that police provide witnesses with an instruction prior to a show up identification as recommended by the Study Group Report. In 2013, the Study Group Report recommended that before a police officer conducts "a lineup, a show up, or a photo array, he or she should instruct the witness in accordance with ***Silva-Santiago***, 453 Mass. at 797-798." The Study Group also issued model forms for use by Massachusetts police departments in eyewitness procedures, which included instructions to be used before conducting the show up identification. See ***Id.*** at 106. A review of our existing jurisprudence suggests that pre-show up instructions appear to be in current use by many Massachusetts police departments. ("Over the past few years, Massachusetts police departments have begun to issue their officers cards containing standardized show up instructions"). "Not only would such a protocol provide important information to the eyewitness that may reduce the risk of a misidentification, but adhering to it would permit the law enforcement officer following the protocol to testify more accurately and with greater precision as to what the witness was told prior to the identification." ***Silva-Santiago***, 453 Mass. at 798. The failure to instruct a witness prior to a show up identification will carry the same consequences as a failure to follow the ***Silva-Santiago*** protocols. See ***Thomas***, 476 Mass. at 459. ("It affects a judge's evaluation of the admissibility of the identification; and, where it is found admissible, it affects the judge's instructions to the jury regarding their evaluation of the accuracy of the identification").

A. Miranda and Other Issues

Custodial Interrogation

Commonwealth v. Cawthron, 479 Mass. 612, (2018): The SJC held that the police were not required to give Miranda warnings to the defendants because they were not in custody. The SJC applied the four factors when determining whether the defendants were in custody. The factors considered are: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest." ***Commonwealth v. Groome,*** 435 Mass. at 211–212 (2001). "Rarely

is any single factor conclusive." ***Commonwealth v. Bryant***, 390 Mass. 729, (1984).

There was no dispute the initial encounter amounted to a Terry-type stop, with an initial, brief inquiry into the suspicious transactions that a police officer believed were a conspiracy charge. See ***Terry v. Ohio***, 392 U.S. 1, 28-29 (1968). These types of stops are permissible where an officer has a reasonable suspicion that a crime has been, is being, or is about to be committed. See***. Id.*** Miranda warnings are not necessary when the interaction is casual. See ***Commonwealth v. Borodine***, 371 Mass. 1, 4 (1976). However, the nature of the interaction may change, as officers begin to focus on a particular suspect. When the nature of the interaction changes, Miranda warnings are required to protect suspects from police-dominated environments that were "created for no purpose other than to subjugate the individual to the will of his examiner." ***Commonwealth v. Kirwan***, 448 Mass. 304, 312 (2007) freedom of movement of the degree associated with a formal arrest"). See generally Grasso & McEvoy, Suppression Matters under Massachusetts Law § 18-3[b] (2017). The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody." ***Commonwealth v. Groome***, 435 Mass. 201 , 211 (2001).

Commonwealth v. Medina, 485 Mass. 296 (2020): On December 4, 2015, a caller who identified himself as "Juan" telephoned 911 and reported that he had seen several sets of human remains at the defendant's home. Officer Bryan Gustis of the Hartford police responded to the defendant's house where he spoke with the defendant about possibly having human remains. The defendant told Detective Gustis that he kept these bones for religious purposes and that he had five sets of human remains in black trash bags. According to the defendant, he purchased the remains in May 2015, from an unidentified man in Worcester, at a cost of approximately $3,000 apiece. The defendant shared photographs of the bones while they were entombed. Detective Gustis did not arrest nor handcuff the defendant. Rather other officers form the Hartford PD, arrived on scene and the defendant shared photographs of the bones he had. The Hartford Police confirmed that in October 2015, a mausoleum in Worcester had been broken into, and six sets of human remains had gone missing. After two and one-half hours of continuous discussion at the apartment, the defendant agreed to go to the police station where he was interviewed for another two hours. The interview culminated in a written statement that the defendant then declined to sign. Worcester police relayed to Hartford police that they had probable cause to arrest the defendant, and asked that he be held as a fugitive from justice. The Hartford police complied, and the defendant was arrested. Hartford police officers also sought and received a search warrant for the defendant's apartment. From his first encounter with Detective Gustis until his arrest at the station, the defendant was never provided Miranda warnings.

Conclusion: The SJC held that the defendant was not subject to custodial interrogation while speaking with officers of the Hartford police department and therefore Miranda was not required. Additionally, the SJC found that the defendant's statements were voluntary and his statements should not be suppressed.

The SJC had to determine whether the suspect was subject to custodial interrogation which is a question of Federal constitutional law." ***Commonwealth v. Morse***, 427 Mass. 117 (1998). Here, the police spoke with the defendant for several hours in two separate locations. The first encounter with police occurred at the defendant's apartment and the second interview took place at the police station.

Whether a suspect tis "in custody," requires an inquiry as to whether what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." See ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995). "Not all restraints on freedom of movement amount to custody for purposes of Miranda." ***Howes v. Fields***, 565 U.S. 499, (2012). Outside a formal arrest, a suspect is in custody "if the

officer detaining the suspect treats the suspect in a manner that a reasonable person would regard as involving an arrest for practical purposes" See 1 McCormick On Evid. § 151 (8th ed. 2020) (discussing applicability of Miranda, "custody," "interrogation," and exceptions). The SJC used the ***Groome*** factors which include "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest." After reviewing the factors listed below, the SJC found that the defendant was not custody and his statements were admissible.

1. Place of the Interrogation:

The officers who interviewed the defendant did not transform his apartment into a coercive environment. The first officer to arrive came alone, knocked on the defendant's door, and only entered the apartment with the defendant's permission. See ***Commonwealth v. Sneed***, 440 Mass. 216, 221 (2003) (no custody where suspect "voluntarily admitted her questioners into the familiar surroundings of her home"). Although more officers arrived over the following two hours, it does not appear that they meaningfully restricted the defendant's freedom of movement within his home. See ***Crooker***, 688 F.3d at 11–12 (no custody despite presence of numerous armed officers in home, due to lack of physical restraint and cooperative interactions). In the absence of police domination, the defendant's home remained an inherently non-coercive setting. The first officer to arrive came alone, knocked on the defendant's door, and only entered the apartment with the defendant's permission. See ***Commonwealth v. Sneed***, 440 Mass. 216, 221 (2003) (no custody where suspect "voluntarily admitted her questioners into the familiar surroundings of her home").

Although more officers arrived over the following two hours, it does not appear that they meaningfully restricted the defendant's freedom of movement within his home. See ***Crooker***, 688 F.3d at 11–12 (no custody despite presence of numerous armed officers in home, due to lack of physical restraint and cooperative interactions). Nor did the officers assert control over the surroundings, such as by removing the defendant's two pit bulls that were chained up in the apartment. In the absence of police domination, the defendant's home remained an inherently non-coercive setting. During this first stage of questioning, police officers did not signal to the defendant that he was suspected of committing any crime. ***Groome***, 435 Mass. at 211-212. Rather, they explained that they had received a report that human remains were in the defendant's home, and were responding to learn whether that report was accurate. Notwithstanding the officers' testimony to the contrary, the motion judge determined that they should have known, and indeed did know, that they were investigating the defendant on suspicion of criminal activity. She concluded that this knowledge contributed to the custodial nature of the interrogation. While the officers well may have known that they had uncovered evidence of a crime during their time in the defendant's apartment, their subjective understanding alone does not alter the custody analysis.

2. Person was a Suspect:

Again, the police were questioning the defendant for investigative purposes and there was no indication that he knew he was a suspect.

3. Nature of the interviews:

The nature of the officers' questioning also was consistent with the non-custodial nature of this interaction. When speaking to the defendant in his apartment, the officers' questions were "investigatory rather than accusatory." ***Commonwealth v. Kirwan***, 448 Mass. 304, 311 (2007). There is no indication that the officers raised their voices, threatened the defendant, or expressed disbelief in response to his answers. See ***Sneed***, 440 Mass. at 221 (no custody, in part, because there was "no evidence of shouting or raised voices on the part of the investigators"). The defendant was "cordial" and cooperative and he offered additional information and evidence without any prompting by the officers. Indeed, the motion judge's findings reflect that the defendant sought to discuss, at length, the role that the human remains played in his religious practices. Whereas the "contours of the discussion with [police] were left entirely up to the defendant," ***Groome***, 435 Mass. at 213, the officers' questions did not exert the kind of coercive pressure associated with custodial interrogation.

4. Freedom to Leave:

The SJC found that the motion judge erred when she found that the defendant tried to leave or to put the police out of his apartment, and he was not allowed to do so. Based on this one factor, the judge concluded that the defendant was in custody in his apartment. While freedom to leave "may be a critical factor it cannot be the determinative factor." ***Cawthron***, 479 Mass. at 623. This factor is relevant only insofar as officers communicate to a defendant, through word and action, that he or she is being detained. There was no finding that the defendant had asked police to leave and he was told no. Looking at the objective features of the defendant's encounter with police, the inquiry should be whether a reasonable person in the defendant's position would feel free to leave or to put the officers out of his apartment. The defendant was not handcuffed nor was he told he was under arrest. Based on the over- all nature of his interaction with the police, a reasonable person in the defendant's position likely would have concluded that he was still free to leave or cut off questioning at that point.

Nonetheless, these conditions do not tip the scales in favor of a determination of custody at the defendant's apartment. The picture that emerges from these initial interviews is that of a man speaking openly with officers about his possession of human remains and the religious practices that motivated him, rather than a suspect reacting to coercive pressure from the police. It is not clear on the record before us whether the nature of the interview changed after the defendant agreed to accompany officers to the police station. Without these missing details, the SJC could not determine whether the defendant was in custody at the police station. Regardless of the circumstances surrounding the interview at the police station, the substance of the defendant's statements does not appear to have changed. There is no indication in the record that the defendant provided new information to police at the station. Even if the defendant was in custody while at the police station, the statements he made at the apartment would not be suppressed.

2nd Issue: Were the statements voluntary?

"In determining whether the defendant's statements were voluntary, the SJC considered whether the statements were the product of a rational intellect and a free will." ***Commonwealth v. Woodbine***, 461 Mass. 720, 729 (2012). A number of factors may be relevant in this determination, including "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." ***Commonwealth v. Mandile***, 397 Mass. 410,

413 (1986). Based on the facts of this case, Miranda warnings were not required when officers spoke to the defendant at his apartment. There is no indication that police officers employed coercion or deception to elicit any of his statements. To the contrary, the defendant was forthcoming and offered statements without prodding from the officers. Nor was this cooperation clearly a result of a complete lack of familiarity with the criminal justice system; as the judge found, police previously had recovered a skull from the defendant that had been removed from a Hartford cemetery. Based on the facts of the case, the no indication that the defendant's statements at the apartment were anything but the product of his own free will and rational intellect. Without evidence tending to show that these statements were involuntary, the statements should not have suppressed.

Handcuffing for safety reasons does not automatically transform an encounter into an arrest.

Commonwealth v. Vellucci, 98 Mass. App. Ct. 274 (2020): On April 19, 2016, Wilmington Police observed a vehicle stopped on the fog line on the side of Lowell Street. The vehicle was running and one headlight was out and the driver's side front tire was completely blown away. Jeffrey Vellucci was sitting in the driver's seat when Officer Dillon Halliday parked his cruiser behind the vehicle. Officer Halliday observed the defendant grab the door frame of the Cadillac, pull himself out of the vehicle and start working towards the cruiser. Officer Halliday directed the defendant to return to his vehicle. At that point the defendant appeared frustrated and aggressive as he was waving his arms at the officer. The defendant continued walking towards Officer Halliday despite his directive to return to the vehicle. Due to safety concerns, Officer Halliday handcuffed the defendant and conducted a patfrisk. The defendant was not armed and when asked what was going on, the defendant relayed that he was a CPA and he was celebrating the end of tax season with colleagues. The defendant also said he had a couple of beers and that he made a mistake. Officer Halliday noted that the defendant was unsteady on his feet, his speech was slurred and he smelled of alcohol. The defendant agreed to perform field sobriety tests at which time he told the police they were out to get him and that they were out to have a good time. The defendant argued that the he was arrested without probable cause when police handcuffed him and that his statements should be suppressed because he was subject to custodial interrogation.

Conclusion: The Appeals Court held that the police were justified in handcuffing the defendant for safety concerns and that he was not in custody when he made the statements to the police.

The Appeals Court found that the defendant was not under arrest when he was handcuffed for safety reasons. There are a number of factors that are evaluated when making this determination. The length of the encounter, nature of the inquiry, the possibility of flight and danger to the safety of others and the public. "The use of handcuffs is not dispositive on the question of whether and when a stop has transformed into an arrest." ***Commonwealth v. Galarza***, 93 Mass. App. C.t 740 (2018). Here, Officer Halliday was alone at night when he observed the defendant's damaged car parked on the fog line on the side of the road with the engine running. The defendant failed to comply with Officer Halliday's request to return to his vehicle and he became more aggravated when Officer Halliday engaged him. The officer's concerns for safety were reasonable and justified handcuffing the defendant to facilitate further investigation. Where the use of handcuffs was "limited in duration and necessary to complete the inquiry," Officer Halliday's conduct was reasonable and did not convert the investigatory detention into an arrest. ***Commonwealth v. Williams***, 422 Mass. 111, (1996). Based on these factors, Officer Halliday's use of handcuffs did not transform the encounter into an arrest.

Next, the Appeals Court had to examine was whether the defendant was the defendant was in custody when he was subject to interrogation and whether he should have been Mirandized. As a general rule, persons temporarily detained during an ordinary traffic stop are not in custody for purposes of Miranda, even though they may not feel free to leave. See ***Berkemer v. McCarty***, 468 U.S. 420, (1984); ***Commonwealth v. Ayre***, 31 Mass. App. Ct. 17, 20 (1991). In the present case, the Appeals Court determined that Officer Halliday's decision to temporarily restrain the defendant with handcuffs did not transform an ordinary traffic stop into one that was custodial in nature such that Miranda warnings were not required. The Appeals Court applied the ***Groome*** factors to determine if the defendant was in custody for Miranda purposes.

Recently, in ***Commonwealth v. Spring***, 96 Mass. App. Ct. 648 (2019), the Appeals Court found that a defendant's statements should have been suppressed after police removed the defendant from the vehicle, handcuffed, placed in the back of a police cruiser, and questioned him regarding documentation for a firearm and ammunition found in his vehicle during an inventory search. The facts of that case suggest that the defendant was subject to custodial interrogation because all of the ***Groome*** factors favored the defendant. ***Id.*** The back seat of the police cruiser was a coercive location in which to question the defendant. ***Id.*** at 651. The questions regarding firearms licensure conveyed the officer's suspicion. Considering all of these factors including that the defendant was not in custody when he responded to Officer Halliday's questions. Accordingly, Miranda warnings were not required and the statements should not be suppressed. Finally, the judge that "[t]he defendant's later statements, that he was a good guy," that he just "made a mistake," "and that he was just out to have a good time, were" not prompted by questions from the police. Statements that are volunteered by the defendant are not the subject of custodial interrogation. See ***Commonwealth v. Diaz,*** 422 Mass. 269, 271 (1996).

Intoxication and Validity of Miranda Waiver

Commonwealth v. Walters, 485 Mass. 271 (2020): On July 29, 2009, the defendant approached detectives at the Braintree police station and said that he really "need[ed] to speak to someone" about a missing person. After he said that he had killed the person, the defendant was handcuffed, brought into an interview room, and seated at a table, where he began to cry. Sherrick entered the room and obtained the defendant's permission to record the interview; the defendant agreed, but then appeared to gag, and Sherrick offered him a wastebasket and advised him to relax. The defendant responded, "I can't relax. My brain is fucked up. I did something real bad." He added, "I should just kill myself." Sherrick left the room and Cohoon, the lead investigator in the missing person investigation, entered dressed in casual clothing. Cohoon asked the defendant if he was okay and offered the defendant water; the defendant indicated he was okay and declined the offer. Cohoon then removed the defendant's handcuffs. The defendant complied with instructions to place one hand, and then the other, on his head as the handcuffs were being removed. He said repeatedly, "Just kill me." Cohoon informed the defendant that he was going to read the defendant the Miranda rights, and the defendant again muttered, "Just kill me." Cohoon read the Miranda rights. The defendant indicated that he understood and wanted to talk to police and he signed a Miranda waiver form.

Throughout the interview, the defendant cried quietly, and at times sobbed. He repeatedly interjected statements such as "What is wrong with my head?" and "Just fucking kill me." At one point, he put his head on the table and let out a loud scream. Interspersed with these comments, the defendant provided a cohesive narrative of events, answered questions, and gave further details when asked. Despite his emotional state, the defendant was lucid and responsive to questions, and corrected the officers if they misstated details of what he told them. When a State police trooper entered the room, the defendant

repeated his account, described where the fight took place, and marked the location of the victim's body on a map.

Approximately one-half hour into the interview, after responding to a question regarding the number of times he struck the victim, the defendant gagged, vomited into a wastebasket, and fell off the chair onto his stomach. The officers rolled the defendant onto his side and told him to take a deep breath and relax because he was okay. They called medics and helped the defendant back into his chair. He vomited again, said "Kill me," and took a drink of water. The officers took a break from questioning and left the defendant alone in the interview room for several minutes, where he drank water, sobbed quietly, and gagged a few more times without vomiting. When the detectives reentered the room, they asked him if he was under the influence of any drugs. He said that he had smoked crack a few hours earlier, and that he had been drinking and taking drugs and driving around in his truck for the past few days. The questioning resumed, while the defendant continued to sob and repeat similar statements such as "Shoot me" and "I just want to die," while continuing to respond to questions. When he said that he did not want to talk anymore, the interview ended approximately one hour and nine minutes after it began.

The defendant was indicted on charges of murder in the first degree, G. L. c. 265, § 1; breaking and entering into the dwelling of another during the day time, with the intent to commit a felony while armed, G. L. c. 266, § 18; and larceny from a building, G. L. c. 266, § 20. The defendant filed a motion to suppress arguing that his statements were involuntary. The motion was denied, and a video recording of the interview was played for the jury. The defendant appealed his conviction.

Conclusion: The SJC held that the defendant's Miranda waiver was valid despite his statement that he had consumed crack cocaine a few hours before the interview, and despite his evident emotional distress during the interview.

The SJC examined whether the defendant's physical and mental state had an impact on his Miranda waiver. For a waiver to be knowing, intelligent, and voluntary, a defendant must understand the Miranda warnings themselves, but need not fully appreciate the tactical or strategic consequences of waiving the enumerated rights. ***Commonwealth v. Hilton***, 443 Mass. 597, 606 (2005). The fact that a defendant repeatedly was given Miranda warnings, indicated that he understood his rights, and signed a form agreeing to waive them, while evidence of voluntariness, is not dispositive. See ***Commonwealth v. Magee***, 423 Mass. 381, 387 n.8 (1996) (signed waiver form, although not dispositive, constitutes evidence of voluntariness). The defendant's intoxication and disturbed mental state were also considered. While intoxication bears heavily on a determination whether a Miranda waiver was voluntary, as discussed supra, intoxication alone is insufficient to invalidate a waiver. Here, the motion judge concluded that, notwithstanding the defendant's statement that he had smoked crack cocaine hours before speaking to the police, there was "no evidence that the drugs caused [the defendant] to be detached from reality or unable to concentrate, or affected his memory." This conclusion was bolstered by the defendant's ability to offer a detailed narrative of the incident, including a self-serving estimate of the number of times he hit the victim. See ***Commonwealth v. Silankas***, 433 Mass. 678, 685-686 (2001) (intoxicated defendant's high degree of concentration, memory, rationality, and coherence at time of questioning support conclusion waiver was voluntary).

"The fact that a defendant may have been in a disturbed emotional state, or even suicidal," while important, "does not automatically make statements involuntary." ***Commonwealth v. Perrot,*** 407 Mass. 539, 542, 543 (1990) (statements were voluntary even though defendant had asked for gun to kill himself). Here, the defendant made suicidal statements throughout the interview. He also cried quietly, sometimes

sobbed, screamed once, and gagged repeatedly. Nonetheless, the defendant gave lucid and coherent responses to the officers' questions, and at times corrected the officers' misstatements of his account. Based on the facts, the defendant was not too intoxicated or mentally disturbed to knowingly, intelligently, and voluntarily waive his Miranda rights.

The SJC also examined whether the defendant's statements were voluntary. Although both require the same totality of the circumstances test, the voluntariness of a defendant's statements is a distinct inquiry from the question of the voluntariness of a Miranda waiver. See ***Commonwealth v. Medeiros***, 395 Mass. 336, 343 (1985). A statement is voluntary if it "is the product of a rational intellect and a free will, and not induced by physical or psychological coercion." ***Commonwealth v. Weaver***, 137 S. Ct. 1899 (2017).

Lastly, the SJC found that there was no evidence the police coerced the defendant into making statements. Police provided the defendant with proper Miranda warnings; the tone of the conversation was "low-key and sympathetic;" police told the defendant several times that it was important to talk, but that they wanted to be sure he was okay before they continued; the defendant was not handcuffed; the officers did not use deceptive tactics or misleading assurances; when he vomited, they offered him medical assistance and water, left him alone briefly to compose himself, and verified that he was willing to continue speaking before continuing.

The SJC also considered whether the defendant's intoxication and mental state were factors when determining whether the defendant's statements were voluntary. The defendant was highly agitated, and repeatedly commented that he should kill himself, or the police should kill him. He cried throughout the interview. He gagged and vomited, falling off his chair. When the officers asked him whether he was under the influence of any drugs, he responded that he had been drinking and taking drugs and driving his truck around for the past two days, and had smoked crack cocaine a few hours before coming into the station. The analysis whether a defendant's intoxication renders the defendant's statements involuntary is similar to the analysis whether a defendant's Miranda waiver was voluntary. See ***Commonwealth v. Howard***, S.C., 479 Mass. 52 (2018).

Additionally, the defendant gave a detailed and coherent narrative, and appeared lucid throughout the interview, which indicated that his level of intoxication did not render his statements involuntary. See ***Id***. The defendant's mental state and his suicidal ideation, the defendant's statements were voluntary. The defendant gave a detailed, coherent narrative of facts, and attempted to minimize the number of times he hit the victim, and apparent grounding in reality demonstrated that his statements were voluntarily and intelligently made. It is clear that a defendant makes a statement in an agitated or emotional mental state, the question whether the statement was freely given requires close analysis. In ***Magee***, 423 Mass. at 386-387, for example, the court held that a defendant's statements were involuntary after seven hours of prolonged questioning, where the defendant, in an exhausted and sleep-deprived state, cried and shook uncontrollably.

Similarly, in ***Commonwealth v. Scherben***, 28 Mass. App. Ct. 952, (1990), the Appeals Court held where the defendant was not drunk but was under the influence of alcohol, and was nervous and upset; where three police officers were present; and where the interrogation was conducted at a late hour, close to midnight does not render the statements involuntary. Nonetheless, a defendant's disturbed, or even suicidal, mental state does not automatically render his or her statements involuntary. See ***LeBlanc***, 433 Mass. at 555. An agitated or distressed mental condition, for example, could be "natural for someone who [has] admitted the commission of serious crimes." See ***Perrot***, 407 Mass. at 542-543 (statement voluntary despite fact that defendant was emotional, asked for police officer's gun to kill himself, and was placed on

suicide watch). Moreover, despite his distressed demeanor, here the defendant repeatedly provided officers with a coherent narrative of the incident, and there was no indication that he was acting irrationally. See ***LeBlanc***, supra at 552, 554-555 (statement was voluntary where defendant, although suicidal and in emotional turmoil, described incident in detailed narrative form).

B. Status of Cell Phones

Obtaining Search Warrants for Cell Phones

Commonwealth v. Onyx White, 475 Mass. 583 (2016): The SJC holds (1) that probable cause to seize a cell phone cannot rely **SOLELY** on a police officer's opinion that a cell phone is likely to contain evidence of the crime under investigation, and (2) once police make a warrantless seizure of a cell phone supported by the requisite probable cause, they must make it a PRIORITY to secure a search warrant. The Court specifically found that the simple assertion that police, based upon training and experience, know that cell phones are necessary to social interactions and therefore, contain evidence of criminal activity, does not provide the necessary nexus between the phone and the crime under investigation.

The SJC holds that police properly seized a cell phone incident to arresting the defendant, but improperly exceeded the scope of an inventory search by asking investigatory questions about the phone.

Commonwealth v. Tomas Barillas, 484 Mass. 250 (2020): On March 24, 2017, State Police Trooper Matthew Wilson was involved in investigating a fatal stabbing in Lynn. During the course of the investigation, Trooper Wilson and Lynn police learned that the defendant, Tomas Barillas, had outstanding warrants for larceny and drug offenses. Police located the defendant at his mother's multifamily dwelling. Trooper Wilson arrested the defendant and conducted a patfrisk. He seized a cell phone from the defendant's pocket, and transferred it to his own pocket. At the house, the defendant's father and his brother James agreed to speak with police at the Lynn police station. At the station, Trooper Wilson did not give the cell phone to the booking officer, nor did he fill out a State police custodial property inventory form.

During an interview with James and the defendant's father, Trooper Wilson asked James whether he had a cell phone. James identified the cell phone in Trooper Wilson's possession as his phone. To test the veracity of this claim, Trooper Wilson asked James for the code to access the cell phone. The code James supplied unlocked the device. Trooper Wilson continued to question James about the phone. Ultimately, James informed the police that his mother paid the bills and that the defendant used the cell phone "very often," but claimed it was his phone. Trooper Wilson obtained a consent form from James to search the cell phone. A "hand search" of the device revealed a video recording of the defendant talking about the crime. A later forensic search revealed evidence of calls and text messages between the victim and the defendant on the night of the stabbing. The police returned the device two days later to James's mother.

The defendant filed a motion to suppress arguing that the police lacked probable cause to search the cell phone and that there was no valid exception to the warrant requirement. James's consent authorizing police to search the cell phone was also questioned. The defendant filed an amended motion which deemed the seizure and search of the cell phone as unlawful. The Superior Court allowed the motion because the police handled the cell phone not in accordance with a written inventory policy. Additionally, Trooper Wilson made investigative use of the cell phone before obtaining consent to search it. The Commonwealth appealed on the grounds that the phone was properly seized during a search incident to arrest or pursuant to a valid

inventory policy. The Commonwealth argued that James's assertion that the cell phone belonged to him independently justified the officer's subsequent actions, including verifying his ownership of the cell phone and subsequent consent.

Conclusion: The SJC held that the seizure of the cell phone was proper as a potential weapon under the search incident to arrest doctrine. However, the police made impermissible investigative use of the cell phone and, as a result, any evidence obtained from the consensual search must be suppressed.

1st Issue: Was the cell phone lawfully seized as a search incident to arrest?

The SJC held that the seizure of the cell phone was proper, but the search was not. Pursuant to G. L. c. 276, § 1, "a search incident to a custodial arrest is well established as an exception to the warrant requirement under both the Fourth Amendment and art. 14." ***Commonwealth v. Mauricio***, 477 Mass. 588, 592 (2017). "Under both Fourth Amendment and art. 14 jurisprudence, the purpose of the search incident to arrest exception is twofold:

> **(1) to prevent the destruction or concealing of evidence of the crime for which the police have probable cause to arrest; and**
>
> **(2) to strip the arrestee of weapons that could be used to resist arrest or facilitate escape." *Id.***

With respect to the first exception under the search incident to arrest doctrine, if a police officer believes that a cell phone found on an arrestee might contain evidence of the crime of arrest, the officer may seize that cell phone and secure it. However, the officer must obtain a search warrant before searching the cell phone. See ***Riley v. California***, 573 U.S. 373, 403 (2014). In the present case, the police were arresting the defendant on outstanding warrants for larceny and drug offenses. At the time, there was no evidence that police had reason to believe that the cell phone had evidence linked to the offenses in the outstanding warrants.

The SJC held that the seizure of the cell phone satisfied the second exception under the search incident to arrest doctrine. Arguably, any hard object left in the possession of a suspect who is being arrested and transported may be used as a weapon, and it is not unreasonable to remove the item from the person. In ***Riley***, 573 U.S. at 385, the Supreme Court recognized that "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." ***Id.*** at 387. For example, an officer may examine whether there is a razor blade hidden between the phone and its case. However, "once an officer has secured a phone and eliminated any potential physical threats, data on the phone can endanger no one," ***id.***, and therefore the search of a cell phone as a weapon is limited only to the physical aspects of the phone. Here, it was permissible for police to seize the cell phone as part of a search incident to custodial arrest. The search of the content of the cell phone could not be justified pursuant to the search incident to arrest doctrine.

2nd Issue: Which inventory police should have applied in this case?

The Commonwealth argued that Trooper Wilson's seizure of the cell phone was warranted under the State police inventory policy. The defendant argued that the State police inventory policy cannot govern the inventory search of an arrestee in the custody of the Lynn police. The dispute over which policy governs was significant because the State police inventory policy authorized the search and removal of any property

from the clothing or person of one who comes into the custody of the State police without specifying the appropriate time of seizure. Conversely, the Lynn police inventory policy provided more definitive guidance regarding timing (e.g., "as soon as is reasonably possible after arriving at the station").

The Lynn police inventory policy applied because the defendant was arrested by at least one Lynn police officer, taken to the Lynn police station, and booked by the Lynn police. Trooper Wilson testified that the defendant was in Lynn police custody. There was no dispute that "before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person." ***Commonwealth v. Vuthy Seng***, 436 Mass. 537, 550 (2002). Inventory searches are intended to be non-investigatory and are for the purpose of safeguarding the defendant's property, protecting the police against later claims of theft or lost property, and keeping weapons and contraband from the prison population. See ***id.*** at 550-551. "This inquiry is fact driven, with the overriding concern being the guiding touchstone of reasonableness" ***Commonwealth v. Abdallah***, 475 Mass. 47, 52 (2016). An inventory policy "must be written" and "explicit enough to guard against the possibility that police officers would exercise discretion." ***Commonwealth v. Rostad***, 410 Mass. 618, 622 (1991).

This court repeatedly has upheld the suppression of evidence where investigatory use is made of items seized for a purported inventory purpose. See, e.g., ***Mauricio***, 477 Mass. at 596 (search of digital camera exceeded bounds of inventory search exception because it was investigatory in nature); ***Commonwealth v. White***, 469 Mass. 96, 101-102 (2014) (while lawfully seized container could be opened in accordance with inventory policy, search warrant was required to examine pills for investigative purposes); ***Vuthy Seng***, 436 Mass. at 553-554 (viewing information on front of bank card was permissible because it "declare[d] its nature to anyone at sight," but recording account numbers written on back of card made it impermissible investigative search).

If Trooper Wilson had seized the cell phone in accordance with Lynn police inventory policy, the phone should have been promptly provided to the booking officer and secured in a property envelope and stored in the appropriate property locker. However, Trooper Wilson did not give the phone to the booking officer and he also neglected to complete the appropriate inventory forms. The SJC also considered what happens if the discovered property actually belongs to a third person, or if a third person claims the property, the inventory policy should provide guidance for determining the ownership of the item and the handling the item. If the police want to search the inventoried property for evidence of a crime, they need to obtain consent from the appropriate person (as determined by the inventory policy) or a search warrant.

In the underlying case, Trooper Wilson learned that the phone belonged to the defendant's brother. Upon this discovery, Trooper Wilson continued to ask James direct question about the ownership and usage of the phone. The questions Wilson asked turned an inventory into an investigation which is "inconsistent with the purposes underlying the inventory search exception to the warrant requirement, and is thus at odds with our law." ***Mauricio***, 477 Mass. at 596. For all of these reasons, the inventory of the phone was improper.

The SJC held that the police were justified in seizing the defendant's cell phone as part of a search incident to custodial arrest. However, the police exceeded the scope and searching the phone without a warrant was not justified and did not fall within and of the exception to the warrant requirement.

Commonwealth v. Frank Barrett: 97 Mass. App. Ct. 437 (2020): On April 23, 2009, a Boston police officer witnessed a man and a woman pacing back and forth on Townsend Street. Suspecting that they were drug users, he began surveillance. After several minutes, the officer saw the defendant, Frank Barrett,

arrive and he begin walking with the man into a park. After a few seconds, the man rejoined the woman, and the defendant was not visible. The officer followed the couple and found the man holding three bags of a substance that resembled heroin, preparing the heroin for intravenous use. The officer arrested the man and the woman.

At the police station, the man agreed to call the person who sold him the drugs from a police telephone. During the call, the officer heard the man state that he had another forty dollars and wished to purchase more heroin and he agreed to meet in Dudley Square. The officer did not record the number that of the call received. An hour later, the officer identified the defendant exiting a bus in Dudley Square. The police arrested the defendant at approximately 6:30 P.M. Police found five plastic bags of crack cocaine and eleven plastic bags of heroin, either on the defendant or in the transport wagon. The police recovered cell phones, $1,537 in cash, and a Massachusetts identification in someone else's name.

Almost two hours later, while the police were doing their paperwork, one of the defendant's cell phones rang. Without a warrant, the officer answered the cell phone. The caller stated he wanted to purchase a forty. The officer arranged to meet the caller "in Dudley." Two officers went to Dudley and met the caller. After returning to the station, the officer again answered the defendant's cell phone when it rang at approximately 9:30 P.M. This caller stated that "he was going to need some heroin for his people real soon." The officer did not describe following up on this call.
The defendant moved to suppress the phone calls and evidence found. There was no evidence presented at the suppression hearing regarding how long it would ordinarily take to obtain a search warrant under these circumstances. After an evidentiary hearing, a judge denied the motion, finding that the exigency exception to the search warrant requirement applied. The motion judge found that "[a] ten-hour time frame would certainly be usually enough time to obtain a warrant. But a one hour or two-hour time frame is not."

Conclusion: The Appeals Court reversed the denial of the defendant's motion and held that the phone calls and the fruits of the phone calls should be suppressed.

Issue: Was there an exigency that justified police searching the defendant's phone without a warrant?

Although police officers are authorized to seize a cell phone during a routine inventory search, their authority does not extend to manipulating the phone. See ***Commonwealth v. Alvarez***, 480 Mass. 1017, (2018). Answering a ringing phone constitutes a search. See ***Commonwealth v DePina,*** 75 Mass. App. Ct. (2009). If police were going to answer the phone without a warrant, they would have to demonstrate that (1) the search or seizure was supported by 'probable cause,' such that a warrant would have issued had one been sought and (2) that there exigent circumstances existed making it impractical to obtain a warrant. ***Tyree***, 455 Mass. at 684. The court has found that the potential loss or destruction of evidence can constitute an exigent circumstance justifying a warrantless entry and search but only if the Commonwealth proves that the officers' belief was objectively reasonable and supported by specific information." ***Commonwealth v. Owens***, 480 Mass. 1034, 1036 (2018). Thus, we may not find the presence of exigent circumstances if "the record is devoid of evidence that obtaining a warrant before the police [conducted a search] was impracticable." ***Id***. at 690. ***Commonwealth v. Huffman,*** 385 Mass. 122, 125 (1982) (no exigent circumstances found when "[t]he Commonwealth did not offer any evidence as to the time it would take to get a warrant, or indicate that it would be impractical to get one"). Here there was no evidence or testimony form the police that it would have been challenging to obtain a search warrant by the time the defendant's rant. The impossibility of obtaining a search warrant in one to two hours is not indisputable nor universally true. See ***Commonwealth v. Forde***, 367 Mass. 798, (1975) ("the failure of

The Commonwealth to offer any explanation why no effort was made to obtain a warrant in the three hours prior to the McDonald conversation which was overheard is fatal to its claim of exigency"). Since is no evidence in the record or testimony, that there was a true exigency and it was impractical to get a warrant. As a result, the motion to suppress was reversed and the defendant's convictions were overturned.

The Appeals Court holds that police had probable cause, first to seize several cell phones and then to search their digital content, and that an 85-day delay in seeking the second warrant to search the cell phones was not unreasonable because the Commonwealth's interest in preserving the evidence outweighed the defendant's possessory interest in the phones.

Commonwealth v. Anthony Arthur, 94 Mass. App. Ct. 161 (2018): On December 15, 2015, the defendant, Anthony Arthur, and two accomplices, Richie Williams and Keyarn Richardson, participated in a coordinated attack on a home in Dorchester. Boston police officers in the area observed the defendant, who was driving one vehicle, and Williams, driving the other vehicle with Richardson inside, park their vehicles on Brinsley Street. Williams and Richardson walked towards Morse Street, where they approached a house while brandishing a firearm. Police saw one of the men fire shots at the house at 7 Morse Street and take off running. The defendant, who had peered through the yards in the area of 7 Morse Street "as if he was waiting for something to occur," quickly returned to his vehicle. Police stopped the vehicle before it could leave the scene.

An officer observed two cell phones in the defendant's car--one on the driver's seat and one on the front passenger's seat. The officer observed three cell phones in the car initially driven by William -- two on the driver's seat and one in the passenger's side door handle. The police impounded both cars and their contents.

Three days after impoundment, the police obtained a warrant to search both cars and to seize all the cell phones. The affidavit in support of the first warrant set forth, among other things, the facts of the coordinated attack. The affidavit specifically identified where the cell phones were located and requested authorization to "seize" them. The warrant was executed on the same day, the cell phones were seized, and they were thereafter held as evidence for trial.

The Commonwealth did not seek to view the contents of the cell phones until 85 days after the impoundment when police applied for and received a second search warrant. The defendant was indicted for armed assault with intent to murder, in violation of G. L. c. 265, § 18(b); attempted assault and battery by discharging a firearm, in violation of G. L. c. 265, § 15F; and possession of a firearm without a license, second offense, in violation of G. L. c. 269, § 10(h)(1). The defendant filed a motion to suppress the evidence found in the cell phones that were taken from his vehicle. The defendant argued that the 85-day delay in seeking the second warrant was unreasonable based on the ***White*** case. ***Commonwealth v. Onyx White,*** 475 Mass. 583 (2016). In ***White***, the affidavit supporting the second warrant failed to show a sufficient nexus between the cell phones and the alleged criminal activity. The Superior Court allowed the motion and the Commonwealth appealed.

Conclusion: The Appeals Court concluded that this case is materially distinguishable from the ***White*** case and held the following:

1. Police had probable cause to seize the cell phones.

2. The delay in seeking the second the second warrant was not unreasonable and there was a sufficient nexus established between the cell phones and the alleged criminal activity.

1st Issue: Did police have probable cause to seize the phones?

The Appeals Court found that police had probable cause to seize the phones because police had particularized evidence linking the cell phones to the crime. The police observed the crime in process, which appeared to be a coordinated attack carried out using separate automobiles, where one could readily infer that the occupants had been in communication. The vehicles left in sequence and the defendants left multiple cell phones on the seats of the cars, leading to the reasonable inference that the cell phones had been used to coordinate the crime. The facts suggest that the cell phones were "evidence of the crime independent of their content," and that the cell phones would be maintained as evidence regardless of whether their contents were ever searched." The cell phones also would be relevant at trial to provide details as to how the crime was planned and coordinated. The location of the cell phones could be relevant in proving joint venture of the suspects involved in the incident. Regardless of whether the cell phones might contain additional, relevant evidence through digital data, the cell phones alone possessed evidentiary value.

Unlike ***White,*** the police lacked probable cause to seize the cell phone because police did not have any particularized evidence linking the cell phone to the crime. The police seized the cell phone of a high school student who was a suspect in a robbery-murder at a convenient store involving multiple people. Police did not have any particularized reason to believe the student's cell phone was involved in the crime or that it would contain any evidence. The officer simply believed that the cell phone might contain evidence based entirely on his experience and generalized reasoning that, where the robbery was a joint venture, the cell phone might contain relevant evidence. ***Id.*** at 590.

2nd Issue: Was the delay in seeking the second warrant unreasonable?

The delay in seeking the second warrant was not unreasonable because police lawfully possessed the cell phones. There was no substantial interest under the Fourth Amendment requiring that the search of the contents of the cell phones occur expeditiously. In contrast to ***White***, police here diligently obtained a search warrant to seize the cell phones within three days of the impoundment of the vehicles.

Further distinguishing ***White***, the Appeals Court ruled that the delay in obtaining the second search warrant to search the content of the phones was not unreasonable because the police lawfully possessed the phones and could keep them for use at trial. The Court balanced the Commonwealth's substantial interest in maintaining the cell phones as evidence against the defendant's possessory interest in the phones during the delay. The Court found that the defendant showed no basis to expect the return of the phones to him prior to trial; hence his possessory interest was outweighed by the Commonwealth's need to preserve evidence.

3rd Issue: Did police establish a nexus between the crimes and the content of the cell phones?

The Appeals Court found that there was a sufficient nexus between the crimes and the cell phones. As the ***White*** court noted, the nexus "need not be based on direct observation. "It may be found in the type of crime, the nature of the evidence sought, and normal inferences as to where such evidence may be found." ***White***, 475 Mass. at 589. The particularized facts linked the cell phones to the crime in this case. Here "the factual and practical considerations of everyday life" tell us that the cell phones found on the car seats likely were used to coordinate the crime, including an exchange of calls, text messages, and perhaps

other information in the days, hours, and minutes leading up to the attack. ***Commonwealth v. Gentile,*** 437 Mass. 569, 573 (2002).

- ❖ **TRAINING TIP:** This case reinforces that particularized facts are necessary to support a search of a cell phone's contents.

- ➢ ***Commonwealth v. Cruzado***, 480 Mass. 275, 282 (2018) (probable cause to search cell phone found next to sleeping defendant, where he had been recently overheard on a cell phone confessing to crime);

- ➢ ***Commonwealth v. Holley***, 478 Mass. 508, 522-524 (2017) (sufficient nexus to search cell phone contents where defendant telephoned victim while entering victim's residence shortly before shooting connected to drug transaction);

- ➢ ***Commonwealth v. Perkins***, 478 Mass. 97, 104-106 (2017) (warrant established probable cause to search call logs of seized cell phones where police had knowledge of defendant's cell phone use to arrange drug transactions);

- ➢ ***Commonwealth v. Dorelas***, 473 Mass. 496, 502-504 (2016) (probable cause to search cell phone where witness reported defendant receiving threats on his cell phone before shooting). Based on the observations of the police and the facts of the case, the Appeals Court held that there was a sufficient nexus connecting the cell phones to the crime.

Cell Site Location Information

Carpenter v. United States, 138 S. Ct. 2206 (2018): The United States Supreme Court has decided that the gathering of cell-site location information (or "CSLI") on a criminal suspect's cell phone, requires police to get a warrant. The criminal suspect has a privacy interest in his physical location and movements which can be accessed from cell site location information.

- ❖ **TRAINING TIP:** The SJC in Massachusetts already requires police to get a warrant before gathering cell site location information.

Commonwealth v. Estabrook, 472 Mass. 852 (2015): The Commonwealth may obtain historical Cell Site Location Information (CSLI) for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, provided the Commonwealth has obtained a court order prescribed by **18 U.S.C. § 2703**.

18 U.S.C. § 2703(d) allows a court of competent jurisdiction to issue an order requiring a cellular telephone company to disclose certain types of records of customers, including CSLI, to a governmental entity if the government establishes that "**specific and articulable facts**" show "**reasonable grounds to believe**" that the records "**are relevant and material to an ongoing criminal investigation**."

Commonwealth v. Broom, 474 Mass. 486 (2016): **The SJC defines the probable cause standard for the seizure of CSLI.** The probable cause standard applicable to cellular site location information **(CSLI)** is probable cause to believe that a particularly described offense has been committed and that the CSLI sought will produce evidence of such offense or will aid in the apprehension of a person who the

applicant has probable cause to believe has committed such offense.

Where a search of a cellular telephone offering smartphone features and access to the Internet is sought, there must be probable cause that the device contains particularized evidence relating to the crime. The properties of such a telephone render it distinct from the closed containers regularly seen in the physical world, and a search of its many files must be done with special care and satisfy a more narrow and demanding standard than exists for establishing probable cause to search physical containers or other physical items or places. In particular, it is not enough that the object of the search may be found in the place subject to search.

Rather, the affidavit must demonstrate that there is a reasonable expectation that the items sought will be located in the particular data file or other specifically identified electronic location that is to be searched.

Commonwealth v. Chamberlin, 473 Mass. 653 (2016): A service provider may disclose customer records voluntarily to the government if the service provider believes in good faith that an "emergency involving danger of death or serious physical injury requires disclosure without delay of information relating to the emergency" pursuant to 18 U.S.C.S. § 2702(c) (1) and (4).

A. Exigent Circumstances & Cell Site Location Information

Commonwealth v Takii Raspberry, 93 Mass. App. Ct. 631 (2018): The "emergency aid exception" justified a warrantless use of cell site location information to track a woman who Boston police believed was about to carry out a shooting. Boston Police were wiretapping another individual's phone when they heard the defendant, Takii Raspberry, tell the suspect in an "angry, upset and emotional" manner that she intended to use a firearm to shoot a man, Alvin Dorsey, with whom she had been in a romantic relationship. Due to the exigency, Raspberry's cell carrier, AT&T, voluntarily provided officers her real-time CSLI information. Once they intercepted her, a vehicle search produced allegedly illegal weapons. The defendant argued that the circumstances did not fall under the emergency aid exception and thus the use of CSLI information constituted an unreasonable search.

The Appeals Court disagreed and affirmed the Superior Court judge's denial of the defendant's motion to suppress. The police "overheard a phone call in which an angry, upset individual said she was going to get the gun and was about to go shoot up [someone] right now,'" Judge Sacks wrote for the court. "The police identified the person making the threat as the defendant and inferred that she was likely talking about shooting Dorsey. The judge, after listening to a recording of the call, found that the police were reasonable in having grave concerns about the defendant imminently causing serious bodily harm."

B. "Pinging" a Phone Qualifies as a Search

Commonwealth v. Almonor 94 Mass. App. Ct. 161 (2018): On August 10, 2012, the defendant, Jerome Almonor shot and killed the victim with a sawed-off shotgun in Brockton. Police were able to identify the defendant as the shooter after obtaining information from an eyewitness and speaking with the individual who was with the defendant when the incident occurred. The police learned that the defendant's cell phone number within approximately four hours of the shooting and contacted the defendant's service provide to find his real time location. The service provider "pinged the defendant's cell phone without his knowledge or consent. Based on the information police received, they responded to the house where the defendant's

girlfriend lived. Police arrested the defendant and recovered a sawed-off shotgun after conducting a protective sweep. The defendant filed a motion to suppress and argued that pinging his cell phone without a warrant qualifies as an unlawful search and violated his rights under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. The Commonwealth appealed after the motion was allowed.

The SJC considered two key issues:

1. **Does pinging a phone to determine someone's real time location qualify as a search?**

2. **Is the search reasonable?**

Conclusion: The SJC held that the police action of causing an individual's cell phone to reveal its real-time location constitutes a warrantless search under art. 14. However, the search was supported by probable cause and was reasonable under the exigent circumstances exception to the search warrant requirement.

Neither this court nor the Supreme Court, however, have addressed the issue as to whether police action that causes an individual's cell phone to transmit its real-time location intrudes on any reasonable expectations of privacy. See ***Carpenter***, 138 S. Ct. at 2200 ("Our decision today is a narrow one). The SJC noted that it does not have to consider this issue under the Fourth Amendment, because article 14 of the Massachusetts Constitution "affords more substantive protection to individuals than that which prevails under the Constitution of the United States." ***Commonwealth v. Mauricio***, 477 Mass. 588, 594 (2017). Pursuant to art. 14, the SJC examined what factors determine whether the defendant has an expectation of privacy. Some of these factors include whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken normal precautions to protect his or her privacy. ***See Commonwealth v. Berry***, 420 Mass. 95, 106 n.9 (1995).

An individual does not have a reasonable expectation of privacy in his or her real-time location under every circumstance. An individual would certainly not have a reasonable expectation of privacy in his or her real-time location while standing on a public sidewalk, visible to any onlookers, including police, who would care to look in the individual's direction. See ***California v. Greenwood***, 486 U.S. 35, 41 (1988) ("police cannot reasonably be expected to avert their eyes from activity that could have been observed by any member of the public"); ***Katz v. United States***, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); ***Commonwealth v. D'Onofrio,*** 396 Mass. 711, 717 (1986). The SJC acknowledged that it had to determine whether the ping in this case implicates a reasonable expectation of privacy and if concluded that it did.

Second, the SJC evaluated whether the search was reasonable under article 14. The search was reasonable because of the exigency in this case. Multiple witnesses identified the defendant as the shooter, and his photograph was positively identified in several photographic arrays. Police had "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances because the delay in doing so would pose a significant risk that [(1)] the suspect may flee, [(2)] evidence may be destroyed, or [(3)] the safety of the police or others may be endangered." ***Figueroa***, supra. Although each of these risks need not be present for exigent circumstances, each was present here. See ***Id***. As to the risk of destruction of evidence, the record reflects that police learned that the defendant still possessed the sawed-off shotgun at the time he fled the scene of the shooting. Because a sawed-off shotgun is per se illegal, it requires ongoing concealment from authorities. Finally, police also had reasonable grounds to believe that

the defendant posed an immediate risk to the safety of police and others. The suspect possessed a sawed-off shotgun, a dangerous and per se illegal weapon. See G. L. c. 269, § 10 (c). The police had reasonable grounds to believe that obtaining a warrant would be impracticable because taking the time to do so would have posed a significant risk that the suspect may flee, evidence may be destroyed, or the safety of the police or others may be endangered. Cf. ***Figueroa***, 468 Mass. at 213-214. Faced with this exigency, the police acted entirely reasonably in pinging the defendant's cell phone to determine its location. Accordingly, the warrantless ping of the defendant's cell phone was justified by exigent circumstances.

Commonwealth v. Fredericq, 482 Mass. 70 (2019): Brockton police were investigating a homicide investigation that resulted in the arrest of Josener Dorisca, who was later indicted for murder. During the investigation, Brockton detectives learned that Dorsica's best friend had communicated with him moments before the shooting. Detective Kenneth Williams recognized Cassio from another incident where he is captured on videotape with others, "flashing large sums of money and discussing the movement of drugs from Florida to Massachusetts." Footage shows a gun as well as involvement in drug dealings. A month after the homicide, police learned that Cassio was on his way to New York with "Paco" and "Paquito." Further investigation revealed that Paco was the defendant and Paquito was Stevenson Allonce.

After speaking with Cassio's brother the Commonwealth sought and obtained an order pursuant to **18 U.S.C. § 2703(d)** requiring the cellular telephone carrier to provide the records and the so-called "running location" of that different telephone. The carrier was required to provide Detective Williams with the cellular telephone's location every fifteen minutes prospectively. The carrier "pinged" the telephone at fifteen-minute intervals, an action that is not routinely undertaken by cellular telephone carriers. The CSLI records showed that the defendant was the subscriber of the cellular telephone that Cassio was using. The billing address on those records was 220–222 Howard Street, apartment 2. The records also reflected that the defendant had yet another cellular telephone number. After tracking the CSLI information for a period of time, the police learned that Cassio was in the area based on the pings they had received.

State police were also involved in the investigation and drove to the Howard Street building. After obtaining consent from a couple that lived in the building, the troopers went to the second-floor apartment where they did not find anyone. The troopers continued to the attic where they knocked on a fourth door. The defendant answered and identified himself as Paco. He signed a consent form to search his room. During the search, police found about $2,200 in a cupboard in the defendant's bedroom. A narcotics-trained dog arrived and alerted police to a pillowcase in the crawl space that contained about two kilograms of cocaine. The pillowcase matched one that was found in the Toyota. The defendant denied any knowledge of the contraband. The defendant was indicted for trafficking cocaine in violation of G. L. c. 94C, § 32E (b), and he moved to suppress the cocaine and cash seized during a warrantless search of his residence on the third floor of a multiunit house, which included a crawl space. The motion judge held that the evidence seized during the warrantless search must be suppressed because police obtained cell site location information (CLSI) without a search warrant.

Conclusion: The police may obtain subscriber information and toll records pursuant to a court order issued under 18 U.S.C. § 2703(d), but under art. 14 of the Massachusetts Declaration of Rights, the police may not use CSLI for more than six hours to track the location of a cellular telephone unless authorized by a search warrant based on probable cause

The SJC determined that the defendant has standing to challenge the information police obtained without a warrant while tracking his movements. Even though the defendant was a passenger in the vehicle whose location was being tracked through the CSLI, he was the registered owner of the phone and therefore

had a reasonable expectation of privacy in the location of that telephone. Additionally, he had a property interest in the telephone that was interfered with when the police pinged the telephone, thereby drawing power from its battery

Alternative License Plate Readers

The SJC held that the use of ALPR technology in this case did not constitute a search under the Fourth Amendment to the United States Constitution or under art. 14 of the Massachusetts Declaration of Rights!

Commonwealth v. Jason McCarthy, 484 Mass. 493 (2020): Barnstable police were investigating the defendant, Jason McCarthy, for his involvement in drug distribution. Through surveillance, several "controlled buys," and information from four confidential informants, the Barnstable police developed substantial evidence that the codefendant was distributing heroin from his residence to the defendant. During surveillance, police observed a Hyundai vehicle briefly appear at the codefendant's residence. Based on their observations, the police added the Hyundai to the Alternative License Plate Reader ("ALPR") hot list. Afterwards, police would receive notification anytime the Hyundai was detected crossing the Bourne or Sagamore bridges. The historical data revealed that the defendant had crossed the bridges a number of times over a three-month period. The defendant's vehicle also sent real-time alerts to the police which ultimately led to his arrest.

On February 22, 2017, Barnstable police received an alert that the Hyundai had traveled over the Sagamore Bridge onto Cape Cod. Police observed the defendant and co-defendant meet for thirty seconds and depart. Police stopped the defendant and codefendant after believing a drug transaction had taken place. Both the defendant and codefendants were arrested and read their Miranda rights. Two cell phones were recovered from the defendant. The defendant filed motions to suppress the ALPR data and any items recovered after the arrest. The motions were denied and the defendant appeal and a single justice allowed the appeal to proceed before the full court.

Conclusion: The SJC held that police's limited use of the ALPR data in this case did not violate the defendant's expectation of privacy. However, the SJC recognized that the widespread use of ALPRS could implicate an individual's constitutionally protected expectation of privacy in certain circumstances.

1st Issue: Does the use of ALPR technology by police constitute a search under the Fourth Amendment or art. 14?

The SJC held that the police's limited use of the ALPR in this case did not constitute a search. To determine if the use of the ALPR constituted a search, the SJC considered the length of the surveillance and what content was captured. The ALPR information provided the police with times and dates that the defendant traveled across the bridges into Cape Cod. However, this data did not track every more the defendant made which differentiates it from pinging a cellphone. As part of its analysis, the SJC recognized along with the decisions issued from the Supreme Court how advancing technology undercuts traditional checks on an overly pervasive police presence because it (1) is not limited by the same practical constraints that heretofore effectively have limited long-running surveillance, (2) proceeds surreptitiously, and (3) gives police access to categories of information previously unknowable.

As the Supreme Court found in ***Jones***, "in the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken." ***United States v. Jones***, 565 U.S. 400, 429 (2012). The continuous, tireless, effortless, and absolute surveillance of the digital age contravenes

expectations of privacy that are rooted in these historical and practical limitations. For this reason, when the duration of digital surveillance drastically exceeds what would have been possible with traditional law enforcement methods, that surveillance constitutes a search under art. 14. See, e.g., ***Augustine***, 467 Mass. at 253.

To determine whether a person has a reasonable expectation of privacy within the public, the SJC examined what was knowingly exposed and whether the collection of data cumulatively had an impact. See ***Katz.*** Essentially, while the Fourth Amendment and art. 14 "protect people, not places," whether something is knowingly exposed to the public remains a touchstone in determining the reasonableness of a person's expectation of privacy. See ***Augustine***, 467 Mass. at 252.

A. What is knowingly exposed?

Under this doctrine, police observation of the exterior of an automobile is not a search because it is "knowingly exposed." See ***New York v. Class,*** 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search'"). In ***Commonwealth v. Starr***, 55 Mass. App. Ct. 590, 591 (2001), the court held that the defendant had no reasonable expectation of privacy that would prevent an officer from examining his license plate.

Similarly, the Supreme Court held in ***Knotts*** that the warrantless use of a radio "beeper" to assist police in tracking a vehicle on a single journey was lawful. Specifically, "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. To further determine what was knowingly exposed in this case, the SJC looked at the cases involving emerging surveillance technology. When new technologies drastically expand police surveillance of public space, both the United States Supreme Court and this court have recognized a privacy interest in the whole of one's public movements. See ***Carpenter***, 138 S. Ct. at 2217 ("individuals have a reasonable expectation of privacy in the whole of their physical movements"); ***Johnson,*** 481 Mass. at 716; ***Augustine***, 467 Mass. at 248-249; ***Commonwealth v. Rousseau,*** 465 Mass. 372, 382 (2013).

In ***Rosseau***, the court held that affixing a GPS tracking device to a vehicle allows the government to contemporaneously monitor electronically an individual's comings and goings in public places invades one's reasonable expectation of privacy." ***Rousseau***, 465 Mass. at 38. Next, in cases addressing police access to CSLI, both this court and the Supreme Court reaffirmed the same principle that it is objectively reasonable for individuals to expect to be free from sustained electronic monitoring of their public movements. See ***Augustine***, 467 Mass. at 247-248. See also ***Carpenter,*** 138 S. Ct. at 2219.

B. Mosaic Theory

When new technologies drastically expand police surveillance of public space, both the United States Supreme Court and this court have recognized a privacy interest in the whole of one's public movements. See ***Carpenter***, 138 S. Ct. at 2217 ("individuals have a reasonable expectation of privacy in the whole of their physical movements"?). The first time this issue arose was within the context of a GPS device affixed to a suspect's vehicle. Ultimately, the SJC held that "the government's contemporaneous electronic monitoring of one's comings and goings in public places invades one's reasonable expectation of privacy." ***Rousseau***, 465 Mass. at 382. Next, in cases addressing police access to CSLI, both this court and the Supreme Court reaffirmed the same principle -- that it is objectively reasonable for individuals to expect to be free from sustained electronic monitoring of their public movements. See ***Augustine***, 467 Mass. at 247-248. Both courts reached these conclusions, in part, by distinguishing the relatively primitive

beeper used in ***Knotts*** from the encyclopedic, effortless collection of CSLI and GPS data. See ***Augustine***, 467 Mass. at 252. See also ***Carpenter***, 138 S. Ct. at 2215, 2218 (distinguishing "rudimentary" beeper used in ***Knotts*** to track single "discrete automotive journey" from use of CSLI, which achieves "near perfect surveillance, as if [the government] had attached an ankle monitor to the phone's user").

These cases articulate an aggregation principle for the technological surveillance of public conduct, sometimes referred to as the **mosaic theory**. The mosaic theory is therefore premised on aggregation: it considers whether a set of non-searches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic"). See, e.g., Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 320 (2012). When collected for a long enough period, "the cumulative nature of the information collected implicates a privacy interest on the part of the individual who is the target of the tracking." ***Augustine***, 467 Mass. at 253. See ***Jones,*** 565 U.S. at 416. This aggregation principle or mosaic theory is wholly consistent with the statement in ***Katz***, 389 U.S. at 351, that "[w]hat a person knowingly exposes to the public is not a subject of Fourth Amendment protection," because the whole of one's movements, even if they are all individually public, are not knowingly exposed in the aggregate. A detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts. "The difference is not one of degree, but of kind." ***Id***. at 562. "Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." ***Id.***

2nd Issue: Whether the use of ALPRs by the police invades an objective, reasonable expectation of privacy?

The SJC analyzed the extent to which a substantial picture of the defendant's public movements is revealed by the surveillance. For that purpose, where the ALPRs are placed matters, too. ALPRs near constitutionally sensitive locations -- the home, a place of worship, etc. -- reveal more of an individual's life and associations than does an ALPR trained on an interstate highway. A network of ALPRs that surveils every residential side street paints a much more nuanced and invasive picture of a driver's life and public movements than one limited to major highways that open into innumerable possible destinations. ***In determining whether a reasonable expectation of privacy has been invaded, it is not the amount of data that the Commonwealth seeks to admit in evidence that counts, but, rather, the amount of data that the government collects or to which it gains access.*** See ***Augustine***, 467 Mass. at 254 ("in terms of reasonable expectation of privacy, the salient consideration is the length of time for which a person's CSLI is requested, not the time covered by the person's CSLI that the Commonwealth ultimately seeks to use as evidence at trial").

In ***Rousseau***, 465 Mass. at 376, the SJC weighed the thirty-one days of GPS monitoring in the constitutional analysis, not the data that placed the vehicle near the suspected arsons on four specific dates. Similarly, in ***Carpenter***, 138 S. Ct. at 2212-2213, the relevant period was the 127 days of CSLI data, not the data that placed the defendant near the robberies on four particular days. For this reason, the constitutional analysis ideally would consider every ALPR record of a defendant's vehicle that had been stored and collected by the government up to the time of the defendant's arrest. With enough cameras in enough locations, the historic location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes. ***The one-year retention period indicated in the EOPSS retention policy certainly is long enough to warrant constitutional protection***. See ***Augustine***, 467 Mass. at 254–255 ("tracking of the defendant's movements [by CSLI] in the urban Boston area for two weeks was more than sufficient to intrude upon the

defendant's expectation of privacy safeguarded by art. 14"); ***Rousseau***, 465 Mass. at 382 (thirty-one days of GPS monitoring was sufficient duration to conclude monitoring was search). Like CSLI data, ALPRs allow the police to reconstruct people's past movements without knowing in advance who police are looking for, thus granting police access to "a category of information otherwise [and previously] unknowable." See ***Carpenter***, 138 S. Ct. at 2218. Like both CSLI and GPS data, ALPRs circumvent traditional constraints on police surveillance power by being cheap (relative to human surveillance) and surreptitious.

For while no ALPR network is likely to be as detailed in its surveillance as GPS or CSLI data, one well may be able to make many of the same inferences from ALPR data that implicate expressive and associative rights. ***American Civ. Liberties Union Found. of S. Cal. v. Superior Court of Los Angeles County***, 3 Cal. 5th 1032, 1044, 221 Cal.Rptr.3d 832, 400 P.3d 432 (2017). ("When police act on real-time information by arriving at a person's location, they signal to both the individual and his or her associates that the person is being watched. To know that the government can find you, anywhere, at any time is -- in a word -- 'creepy"). Of course, no matter how widely ALPRs are deployed, the exigency exception to the warrant requirement would apply to this hot list feature.

Here the SJC considers the constitutional import of four cameras placed at two fixed locations on the ends of the Bourne and Sagamore bridges. "Fourth Amendment [and art. 14] cases must be decided on the facts of each case, not by extravagant generalizations. "There is no real question that the government, without securing a warrant, may use electronic devices to monitor an individual's movements in public to the extent that the same result could be achieved through visual surveillance." ***Augustine***, 467 Mass. at 252. It is an entirely ordinary experience to drive past a police officer in a cruiser observing traffic on the side of the road, and, of course, an officer may read or write down a publicly displayed license plate number. See ***Starr***, 55 Mass. App. Ct. at 594. In this way, a single license plate reader is similar to traditional surveillance techniques.

On the other hand, four factors distinguish ALPRs from an officer parked on the side of the road: (1) the policy of retaining the information for, at a minimum, one year; (2) the ability to record the license plate number of nearly every passing vehicle; (3) the continuous, twenty-four hour nature of the surveillance; and (4) the fact that the recorded license plate number is linked to the location of the observation. These are enhancements of what reasonably might be expected from the police.

The limited number of cameras and their specific placements, however, also are relevant in determining whether they reveal a mosaic of location information that is sufficiently detailed to invade a reasonable expectation of privacy. The cameras in question here gave police only the ability to determine whether the defendant was passing onto or off of the Cape at a particular moment, and when he had done so previously. <u>This limited surveillance does not allow the Commonwealth to monitor the whole of the defendant's public movements, or even his progress on a single journey</u>. These particular cameras make this case perhaps more analogous to CSLI, if there were only two cellular telephone towers collecting data. Such a limited picture does not divulge "the whole of [the defendant's] physical movements," ***Carpenter***, 138 S. Ct. at 2217, or track enough of his comings and goings so as to reveal "the privacies of life." ***Id***. While it is not clear how detailed a picture of the defendant's movements must be revealed to invoke constitutional protections, it is not that produced by four cameras at fixed locations on the ends of two bridges. Therefore, the limited use of ALPRs in this case does not constitute a search within the meaning of either art. 14 or the Fourth Amendment.

- **TRAINING TIP**: Although the Bourne Police Department did not have a separate policy related to ALPRS from the State Police TRF-11, it was not an issue. The police's use of ALPR data is not

subject to the Stored Communication Act nor the Electronic Communications Privacy Act

Pole Surveillance

Under Article 14, a Search Warrant Needed to Deploy Long Term Pole Surveillance of a Defendant's Residence!

Commonwealth v. Mora, 485 Mass. 360 (2020): In November of 2017, a confidential informant identified Nelson Mora as a large-scale drug distributor. The CI introduced an undercover officer to Mora for the purposes of arranging controlled drug purchases. During the course of the investigation, the officer made ten controlled purchases of oxycodone and fentanyl from Mora. After the first controlled purchase, on December 6, 2017, investigators installed a pole camera near Mora's house in Lynn. This camera afforded a view of a portion of the front of Mora's house, the sidewalk next to it, and the adjacent street. On March 23, 2018, investigators set up a second camera near an accomplice's - Suarez - residence in Peabody, which provided a similar view of his home. The cameras directed at Mora's and Suarez's homes provided investigators with a view of their front doorways. Investigators later installed pole cameras in three other locations; one was directed along a street allegedly used by Mora to conduct his drug business, one was directed at the home of another defendant, and the final one near the home of another individual who is not a defendant. All of the cameras recorded uninterruptedly, twenty-four hours a day, seven days a week, until May 23, 2018. In total, the camera positioned near Mora's home captured 169 days of footage; the camera near Suarez's house captured sixty-two days.

The pole cameras used in the investigation shared the same technical capabilities. Each camera was recorded videos, but not audio, and none of the cameras had infrared or night vision capabilities. The inside of any residence could not be viewed. Investigators could remotely zoom and angle the cameras in real time. On occasion, these features permitted investigators to read the license plate on a vehicle. These cameras captured without limitation all persons coming and going from the targeted residences. While the cameras were operating, investigators could view the footage remotely using a web-based browser. The footage also was saved in a searchable format, allowing officers to review particular previously-recorded events. All of the data gathered through this surveillance was stored on a State police server, and later preserved on a removable computer hard drive.

In March of 2018, while the pole camera surveillance was underway, investigators sought and secured warrants for other forms of surveillance, including wiretaps of Mora's and other defendants' cellular telephones, as well as global positioning system (GPS) monitoring. On May 21, 2018, in conjunction with the arrests of the twelve defendants, investigators obtained search warrants for several locations, including the residences of Mora, Suarez, and Guerrero. Police uncovered substantial quantities of heroin, cocaine, and other illicit substances, along with approximately $415,000 in United States currency. Mora, Suarez, and Guerrero and the other defendants moved to suppress the pole camera footage, as well as other evidence derived from that footage. The motion judge denied the motion to suppress on the ground that the pole camera surveillance did not violate the defendants' "reasonable expectation[s] of privacy." See ***Katz v. United States***, 389 U.S. 347, (1967). According to the judge's findings, the defendants whose homes were not captured by pole cameras, including Guerrero's, experienced only a de minimis invasion of their privacy. While Mora and Suarez's residences were targeted, the pole camera surveillance in this case captured only information that was otherwise visible to the public, it was not so invasive that it constituted a "search" in the constitutional sense.

The judge distinguished the video footage collected by the pole cameras from location tracking data

such as GPS monitoring and cell site location information (CSLI) gathered from cellular telephones. See, e.g., ***Commonwealth v. Augustine***, 472 Mass. 448 (2015) (accessing multiple weeks of historical CSLI was "search" under art 14). The judge noted that the pole cameras covered only a fixed point; and did not track the defendants through public and private spaces. The pole cameras attached in fixed locations do not reveal details about the defendant's private associations. Since the surveillance did not expose the same degree of associational information as novel tracking technologies, such as CSLI, the judge determined that pole cameras remain a traditional surveillance technique that may be employed without a warrant. An interlocutory appeal was filed and the SJC had to consider whether the prolonged, targeted surveillance of a defendant's home using pole cameras is a search under Article 14 and if so, do police need a warrant before installing the cameras.

Conclusion: Pursuant to Article 14, the SJC concluded that the continuous, long-term pole camera surveillance targeted at the residences of the defendants qualified as a search and police needed to obtain a warrant before installing the cameras.

The first issue the SJC had to determine was whether the police surveillance in this case qualified as a search. "Under both the Federal and Massachusetts Constitutions, a search in the constitutional sense occurs when the government's conduct intrudes on a person's reasonable expectation of privacy." ***Augustine***, 467 Mass. at 241. Most courts that have addressed pole camera surveillance have concluded that it does not infringe on any reasonable expectation of privacy. In ***United States v. Moore-Bush***, 963 F.3d 29 (1st Cir. 2020), the First Circuit determined that pole camera surveillance is not a search because it falls under the "public view" principle that an individual does not have an expectation of privacy in items or places he exposes to the public. See ***California v. Ciraolo***, 476 U.S. 207, (1986). ("any home located on a busy public street is subject to the unrelenting gaze of passersby, yet the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares").

Second, the SJC considered whether the extended and targeted use of police surveillance of the defendants' homes violated their reasonable expectations of privacy. Neither the SJC nor the United States Supreme Court have considered the constitutional implications of the long-term and targeted video surveillance at issue in this case. Since the status of pole camera surveillance "remains an open question as a matter of Fourth Amendment jurisprudence," the SJC will not "wade into these Fourth Amendment waters." See ***Almonor,*** 482 Mass. at 42 n.9. "Instead as a guidepost the SJC will rely on Article 14 which often affords more substantive protection to individuals than that which prevails under the Constitution of the United States." To show that the use of pole cameras in this case was a "search" under art. 14, the defendants bear the burden of establishing that (1) they "manifested a subjective expectation of privacy in the object of the search," and (2) "society is willing to recognize that expectation as reasonable." ***Commonwealth v. Montanez***, 410 Mass. 290, (1991).

1st Issue: Did the defendants have a subjective expectation of privacy?

The SJC held that the defendants, Mora and Suarez, did have a subjective expectation of privacy because their activities were collectively captured by security cameras for a period of time. The absence of a fence or other effort to shield views of their residence does not diminish their subjective expectation of privacy in those areas. The traditional barriers to long term surveillance of spaces visible to the public have not been walls or hedges –- they have been time and police resources. See ***Jones***, 565 U.S. at 429. While people subjectively may lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their homes, they do not expect that every such action will be observed and perfectly

preserved for the future. See, e.g., ***United States v. Anderson-Bagshaw***, 509 Fed. Appx. 396, (6th Cir. 2012) ("Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents").

Moreover, requiring defendants to erect physical barriers around their residences before invoking the protections of the Fourth Amendment and art. 14 would make those protections too dependent on the defendants' resources. In ***Commonwealth v. Leslie***, 477 Mass. 48, (2017), the SJC noted that affording different levels of protection to different kinds of residences "is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." Similarly, the capacity to build privacy fences and other similar structures likely would correlate closely with land ownership and wealth.

2nd Issue: Did the defendants have a reasonable expectation of privacy?

After considering a number of factors before concluding that the defendants had a reasonable expectation of privacy. The factors the SJC examined included "whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken normal precautions to protect his or her privacy." ***Almonor***, 482 Mass. at 42. In ***Commonwealth v. Rousseau***, 465 Mass. 372, (2013), the SJC recognized "under art. 14, that a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government, targeted at his or her movements, without judicial oversight and a showing of probable cause." ***Id***.

Recently, the SJC adapted the reasonable expectation of privacy analysis of ***Rousseau*** to automatic license plate reader (ALPR) cameras by adopting the "mosaic theory." ***McCarthy***, 484 Mass. at 503-504. "A detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts." ***Id***. at 504. Extended surveillance "reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." ***Id***. Ultimately, the SJC held that the "four cameras at fixed locations on the ends of two bridges" did not reveal this kind of constitutionally-sensitive information, and, thus, the automatic ALPR surveillance employed in ***McCarthy*** did not rise to the level of a search. ***Id***. at 509. Here, the cameras that were installed to surveil the defendants' homes were of greater constitutional significance than those, as in ***McCarthy***, that were directed at a public highway.

The cameras that surveilled the defendants while they were away from their own homes, did not qualify as search. The SJC found that short-term, intermittent, and non-targeted video recording of a person away from his or her own home is little different from being captured by the security cameras that proliferate in public spaces. The United States Supreme Court recognized this traditional non-targeted use of video cameras when it referred to "security cameras" as among the "conventional surveillance techniques and tools" that were not called into question by its holding in ***Carpenter***, 138 S. Ct. at 2220. Law enforcement officers appropriately have relied on security cameras, and other forms of non-targeted video surveillance, to identify and apprehend suspects, particularly in emergency situations.10 See, e.g., ***United States v. Tsarnaev,*** 53 F. Supp. 3d 450, 458 (D. Mass. 2014) (describing evidence obtained from privately-owned surveillance camera in investigation of Boston Marathon bombing). Here, the limited pole camera surveillance of Mora and Suarez away from their homes did not collect aggregate data about the defendants over an extended period. Without such data, the cameras similarly did not allow investigators to generate a mosaic of the defendants' private lives that otherwise would have been unknowable. ***McCarthy***, 484

Mass. at 502. Therefore, this limited surveillance falls within the general rule that a person has no reasonable expectation of privacy in what he or she knowingly exposes to the public.

The SJC differentiated that the surveillance of Mora's and Suarez's homes was long term and continuous and therefore would qualify as a search under article 14. As noted in ***McCarthy***, 484 Mass. at 506, cameras placed "near constitutionally sensitive locations -- the home, a place of worship, etc. -- reveal more of an individual's life and associations than does an ALPR trained on an interstate highway." Of all these protected locations, "the home is first among equals." ***Florida v. Jardines***, 569 U.S. 1, 6 (2013). Protecting the home from arbitrary government invasion always has been a central aim of both art. 14 and the Fourth Amendment. See ***Almonor***, 482 Mass. at 43 (interpretation of art. 14 is "informed by historical understandings of what was deemed an unreasonable search and seizure when [the Constitutions were] adopted."

Similar to CSLI or GPS person tracking, targeted long-term pole camera surveillance of the area surrounding a residence has the capacity to invade the security of the home. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" See ***Kyllo v. United States***, 533 U.S. 27, (2001). This "right [to be free of unreasonable government intrusion] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." ***Commonwealth v. Leslie***, 477 Mass. 48, 54 (2017). Even when pole cameras do not see into the home itself, by tracking who comes and goes over long periods of time, investigators are able to infer who is in the home, with whom the residents of the home meet, when, and for how long. <u>If the home is a "castle," a home that is subject to continuous, targeted surveillance is a castle under siege.</u> Although its walls may never be breached, its inhabitants certainly could not call themselves secure. Without the need to obtain a warrant, investigators could use pole cameras to target any home, at any time, for any reason. In such a society, the traditional security of the home would be of little worth, and the associational and expressive freedoms it protects would be in peril. See ***Blood***, 400 Mass. at 69.

The SJC emphasized that targeted, private video surveillance of an individual's home may intrude on that individual's reasonable expectation of privacy. See ***Polay v. McMahon***, 468 Mass. 379, 384-385 (2014). "Even where an individual's conduct is observable by the public, the individual still may possess a reasonable expectation of privacy against the use of electronic surveillance that monitors and records such conduct for a continuous and extended duration." ***Id***. at 384. The relevant privacy interest is not in a person's movements themselves, but, rather, "a highly detailed profile, not simply of where we go, but by easy inference, of our associations -- political, religious, amicable and amorous, to name only a few -- and of the pattern of our professional and avocational pursuits." ***Commonwealth v. Connolly***, 454 Mass. 808, 834 (2009).

Rather than focus solely on whether a surveillance technology tracks a person's public movements, our analysis under art. 14 turns on whether the surveillance was so targeted and extensive that the data it generated, in the aggregate, exposed otherwise unknowable details of a person's life. See ***McCarthy***, 484 Mass. at 503-504. <u>The combination of duration and aggregation in the targeted surveillance here is what implicates a person's reasonable expectation of privacy</u>. Indeed, compared to the GPS vehicle tracking in ***Rousseau***, prolonged and targeted video surveillance of a home has the potential to generate far more data regarding a person's private life. A video surveillance reveals how a person looks and behaves, with whom the residents of the home meet, and how they interact with others. Pole camera surveillance of the home captures these revealing interactions at the threshold of a person's private and public life. The longer the surveillance goes on, the more the boundary between that which is kept private, and that which is exposed to the public, is eroded.

In this respect, the analysis under art. 14 differs substantially from the Fourth Amendment analysis in ***Moore-Bush***. In ***Moore-Bush***, the First Circuit concluded that there was no difference between defendants' privacy interests "in the whole of their movements over the course of eight months from continuous video recording with magnification and logging features in the front of their house," and the defendant's interest "in the front of his home." ***Moore-Bush***, 963 F.3d at 38 n.8. The court also rejected the notion that the "unrelenting, 24/7, perfect" nature of the pole camera surveillance altered its constitutional analysis. See ***Id.*** at 42. Conversely, the SJC has held that "when the duration of digital surveillance drastically exceeds what would have been possible with traditional law enforcement methods, that surveillance constitutes a search under art. 14."

In this case, for uninterrupted periods of five months and two months, respectively, pole cameras were targeted at Mora's and Suarez's residences. These cameras videotaped not only Mora and Suarez, but also every person who visited their homes, and every activity that took place in the immediate vicinity. Because of the focused and prolonged nature of this pole camera surveillance, investigators were able to uncover the defendants' private behaviors, patterns and associations. Indeed, beginning with Mora, investigators used pole camera surveillance footage, in combination with other information, to identify the codefendants allegedly engaged in his drug-distribution network. When considering the capabilities of the police to conduct such surveillance, our "overarching goal is to assure the preservation of that degree of privacy against government that existed when the Fourth Amendment and art. 14 were adopted." ***McCarthy***, 484 Mass. at 498.

Even if "[p]hysical surveillance, in theory, could gather the same information as the pole cameras," it remains the case that "physical surveillance is difficult to perform." ***United States vs. Garcia-Gonzalez***, U.S. Dist. Ct., No. CR 14-10296-LTS, slip op. at 6 (D. Mass. Sept. 1, 2015). It seems unlikely that investigators could have maintained in-person observation over the course of multiple months without the defendants becoming aware of their presence. See ***McCarthy***, 484 Mass at 500 ("the surreptitious nature of digital surveillance removes a natural obstacle to too permeating a police presence by hiding the extent of that surveillance"). And replacing officers on the ground with a single, automatic, remotely operated surveillance camera eliminated resource constraints that otherwise may have rendered this surveillance unfeasible. ***Jones***, 565 U.S. at 429. ("Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken"). Unlike a police officer, a pole camera does not need to eat or sleep, nor does it have family or professional concerns to pull its gaze away from its target. The "continuous, twenty-four hour nature of the surveillance" is an "enhancement of what reasonably might be expected from the police." ***McCarthy***, 484 Mass. at 508.

Thus, the pole cameras here allowed investigators to overcome several practical challenges to pervasive human surveillance. See ***McCarthy***, ***supra*** at 499. Even assuming that investigators otherwise could have conducted months of human surveillance without being discovered, these pole cameras captured information that a police officer conducting in-person surveillance could not. All of the footage collected by the cameras was stored digitally, in a searchable format, such that investigators later could comb through it at will. The pole cameras gave investigators the ability to "pick out and identify individual, sensitive moments that would otherwise be lost to the natural passage of time." See ***McCarthy***, 484 Mass. at 500. "Far more so than watching in real time, creating a recording enables the extraction of a host of interconnected inferences about an individual's associations, proclivities, and more. Indeed, recording often will be the only way to create a mosaic, since the ability to construct a mosaic depends on the compilation of enough data points -- more than human memory can hold --to yield the big picture." See ***Levinson-Waldman***, supra at 568. The resulting mosaic is "a category of information that never would be available

through the use of traditional law enforcement tools of investigation." ***Augustine***, 467 Mass. at 254. All told, the targeted, long-duration pole camera surveillance of Mora's and Suarez's homes provided the police with a far richer profile of those defendants' lives than would have been possible through human surveillance.

A reasonable person must anticipate that a neighbor could observe some of the comings and goings from his or her residence. Even the prototypical nosey neighbor, Gladys Kravitz from the 1960s television show, "Bewitched," however, occasionally put down her binoculars and abandoned her post at the window to eat and sleep. A briefer period of pole camera use, or one that is not targeted at a home, might not implicate the same reasonable expectation of privacy. ***Bewitched: Be it Ever So Mortgaged (ABC television broadcast Sept. 24, 1964***).

It is enough to conclude that the warrantless surveillance of Mora's and Suarez's residences for more than two months was a "search" under art. 14. ***In the future, before engaging in this kind of prolonged surveillance, investigators must obtain a warrant based on probable cause***. Of course, exceptions to the warrant requirement, such as exigent circumstances, apply with full force to pole camera surveillance that otherwise would be an unreasonable search. Pursuant to Article 14, the SJC held that the continuous targeted surveillance of the defendants' homes was a search and therefore the case is remanded.

Chapter 3

CRIMINAL LAW DEVELOPMENTS

I. Odor of Marijuana Revisited

	Key provisions of Marijuana Legislation for Police	Penalties
Consumption	Public: • Consuming marijuana or marijuana products is prohibited. • Smoking marijuana is prohibited where smoking tobacco is prohibited. Rental Property • Landlord can prohibit smoking marijuana. However rental contract may not prohibit other methods of consumption unless it would violate Federal or state regulations. Bars/ Cafes/ Public Establishments • Towns and cities will vote on whether to allow establishments for on premise consumption and Cannabis Control Commission will have to issue a license. Government Buildings/Schools • Can prohibits marijuana consumption • Also not required to provide a reasonable accommodation even if person has a medical marijuana card. Work • Employer can restrict consumption of marijuana at work even edibles.	$100 fine
Restrictions in Vehicles	• No Operating a vehicle while impaired • No open container	• G. L. c.90, §34G and other criminal penalties • $500 fine

The Odor of Unburnt Marijuana, Together with other Suspicious Factors, Provided Police with Probable Cause to Search a Warehouse!

Commonwealth v. Long, 482 Mass 804 (2019): On October 17, 2017, Amherst police officers on patrol noticed two automobiles parked at one end of a windowless warehouse building, at the far end of the driveway. There were no other vehicles in the parking lot and the building was in a remote area. Fields and trees surrounded the property and there were no close neighbors. Multiple active surveillance cameras were mounted on the exterior of the building. The police checked the registrations of the vehicles and learned that the owner of a Massachusetts-registered Toyota Tundra pickup truck had a number of convictions for possession of marijuana and possession of marijuana with intent to distribute, over a period of almost twenty years, beginning in the late 1990s.

At this point, the officers walked around the 11,000 square foot warehouse which was constructed of cinder blocks. Police noticed PVC exhaust or ventilation pipes extending through the cinder block walls, which appeared to have been recently added. Detective Gregory Wise of the Amherst police department arrived to assist. He had specialized training in narcotics and was familiar with methods utilized to cultivate

and harvest marijuana. Upon walking around the building, police smelled an overwhelming odor of unburnt fresh marijuana. The odor was coming from inside the building and there was a broken padlock on the door attached to the building. There were pry marks on the door and the interior of that building held many empty bottles of a cleaning solvent. While police were on scene, they saw a light coming from a garage door and could see through the cracks an individual leaving the garage and entering the main warehouse.

The police contacted the owner of the building, who reported that he had rented the building to the defendant. The owner's son arrived on scene and said that three or four individuals had been leasing the warehouse for the past year. The tenants paid approximately $4,000 per month; the son did not know the nature of their business.

The police checked the records of "the Medical Marijuana System" and determined that neither the defendant nor the registered owner of the Toyota had a medical marijuana card or was authorized to grow marijuana pursuant to a hardship marijuana cultivation license. A check of the defendant's criminal record indicated that it contained six entries, including possession of marijuana in 2004, 1989, and 1988.

Officers secured the area while another officer went to obtain a search warrant. Upon executing the warrant, police found, and seized, among other items, United States currency, equipment used to cultivate marijuana, and at least fifty pounds of marijuana. The defendant was placed under arrest for trafficking in fifty pounds or more of marijuana, in violation of G. L. c. 94C, § 32E (a).

The defendant moved to suppress the evidence on the ground of a lack of probable cause. He argued that, using only their sense of smell, the police were unable to exclude the possibility that the odor emanating from the windowless, 11,000 square foot, cinder-block warehouse was the product of legal marijuana use, possession, or cultivation. Before the District Court judge could rule on that motion, both parties asked the judge to report a question to the Appeals Court that would resolve the suppression motion, and the SJC transferred the case on its own motion.

The Question Reported to the Court: "Does probable cause exist where an affidavit establishes the overwhelming odor of unburnt fresh marijuana emanating from an 11,000 square foot windowless commercial building with exhaust vents that appears to be covered in plywood where the reported leaseholder has a criminal history including [four] charges of possession of Class D between 1988 and 2004 and no active license to cultivate and the registered owner of a vehicle on the property has a criminal history including charges of possession with intent to distribute a Class D substance in 2015 and possession of a Class D substance in 1999 and 1998, and also had no active license to cultivate pursuant to ***Commonwealth v. Overmyer***, 469 Mass. 16 (2014), and its progeny."

Conclusion: The SJC held that the search warrant affidavit provided probable cause to search the commercial building for evidence of illegal marijuana cultivation because, in addition to the odor of unburnt marijuana, the factors establishing probable cause included the modifications to the structure, the active surveillance cameras, the exclusion of the possibility of legal marijuana cultivation, and the leaseholder's four prior convictions for the possession of marijuana.

Issue: The Odor of Marijuana and Probable Cause:

After the 2008 ballot initiative decriminalizing the simple possession of one ounce or less of marijuana, the odor of marijuana is no longer de facto evidence of criminal activity under Massachusetts law. See ***Commonwealth v. Rodriguez***, 472 Mass. 767, 778 (2015) (police not entitled to stop vehicle

based on detecting odor of burnt marijuana); (odor of marijuana emanating from vehicle does not provide probable cause to search for illegal quantity of marijuana); ***Overmyer,*** *supra* at 21 (odor of unburnt marijuana is not reliable predictor of "the presence of a criminal amount of [marijuana], that is, more than one ounce, as would be necessary to constitute probable cause").

The ability of the police to rely upon the odor of marijuana, burnt or unburnt, as evidence of criminal conduct was even further diminished in 2012 when Massachusetts voters approved "***An Act for the humanitarian medical use of marijuana***." St. 2012, c. 369. The medical marijuana law, codified at G. L. c. 94I, §§ 1-7, provides that a qualifying patient shall not be subject to arrest for the possession of up to a sixty-day supply of marijuana necessary for the patient's personal medical use.

In November of 2016, Massachusetts voters approved a ballot initiative that legalized the recreational possession and use of marijuana by persons at least twenty-one years of age, and allowed limited, regulated commercial sale. See St. 2016, c. 334. The act, codified in G. L. c. 94G, §§ 1-14, and entitled "***Regulation of the Use and Distribution of Marijuana not Medically Prescribed***," provides, "that a person twenty one years of age or older shall not be arrested, prosecuted for possessing, using, purchasing, processing or manufacturing one ounce or less of marijuana, except that not more than five grams of marijuana may be in the form of marijuana concentrate; or within the person's primary residence, possessing up to ten ounces of marijuana and any marijuana produced by marijuana plants cultivated on the premises and possessing, cultivating or processing not more than six marijuana plants for personal use so long as not more than twelve plants are cultivated on the premises at once." G. L. c. 94G, § 7 (a) (1), (2).

As a result of these changes to the Commonwealth's marijuana laws, to obtain a search warrant for an offense involving marijuana, the police are required to establish that they are investigating **illegal** marijuana possession or **illegal** marijuana cultivation, not merely the possession, consumption, or cultivation of marijuana. Police would have to prove that the person possessing or cultivating marijuana is not sanctioned by state law. Here the SJC considered the whether the smell of marijuana would establish probable cause to issue a search warrant. In ***Overmyer,*** the SJC concluded that "a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, 'a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana,' whether burnt or unburnt." ***Id***. at 2. Following that decision, the appellate courts consistently held that the odor of marijuana, burnt or unburnt, without more, is insufficient to establish probable cause that a crime is being committed. See, e.g., ***Commonwealth v. Ilya I***., 470 Mass. 625, 633 (2015). The SJC acknowledged that it did not establish a bright-line rule excluding the odor of unburnt marijuana as one factor in the probable cause calculus in all circumstances. Probable cause, after all, is a "fact-intensive inquiry and must be resolved based on the particular facts of each case." ***Commonwealth v. Morin***, 478 Mass. 415, 426 (2017).

In the underlying case, the affidavit was <u>sufficient to allow a magistrate to find probable cause</u> to search the warehouse for evidence of illegal marijuana cultivation:

First, the police were searching for evidence of marijuana cultivation in a place where it was not allowed under state law. The lease holder, and at least one of the other suspected occupants, <u>did not have medical marijuana hardship cultivation licenses</u>, and <u>cultivation as a registered commercial provider had not yet been implemented under the 2016 voter initiative</u>. See G. L. c. 94G, §§ 1-14. General Laws c. 94G, § 7 (a) (2), allows a person twenty-one years of age or older to cultivate not more than six marijuana plants for personal use "within the person's primary residence," and the commercial warehouse clearly was not a residence.

Second, the search warrant application excluded the possibility of legal marijuana cultivation. The collection of empty chemical bottles, the newly mortared PVC exhaust pipes, and multiple active surveillance cameras on the exterior of the building suggested a cultivation operation. Additionally, police had evidence of an apparent break-in, with lights emanating around the edges of a closed garage door, and two isolated vehicles suspiciously parked after ordinary business hours. One of the vehicles was owned by an automobile dealership in another state, and the second vehicle was owned by an individual who had prior convictions of possession and possession with intent to distribute marijuana over the course of several decades. Although prior convictions of a related offense does not establish probable cause that an individual is committing a similar offense. See ***Commonwealth v. Cordero***, 477 Mass. 237, 246 (2017) (knowledge of a person's arrest record may be considered in a reasonable suspicion evaluation"); ***Commonwealth v. Kennedy***, 426 Mass. 703, 709 (1998) (police officer's knowledge of the reputation for drug use or drug dealing, even though not sufficient alone, is a factor to support probable cause to arrest the defendant). Here the multiple convictions related to marijuana possession and distribution, over a lengthy period, combined with the other evidence, added an additional measure of support to the officers' probable cause calculus.

The Court noted that in ***Commonwealth v. Canning***, 471 Mass. 341 (2015), it found that the search warrant affidavit established probable cause that there was cultivation. However, the cultivation was not illegal because no license or registration check had been done. ***Id.*** at 343–344.

Here, conversely, the police had an overwhelming odor of unburnt marijuana wafting from an 11,000 square foot, windowless, cinder-block warehouse, with all its doors apparently shut, its ventilation system blocked, and new exhaust pipes installed, and the police excluded the possibility of legal cultivation. This is a different situation from the odor of unburnt marijuana emanating from the close confines of an automobile, or the front porch of a house.

- **NOTE:** The SJC specifically stated that its decision does not establish that any odor of unburnt marijuana emanating from a building other than a house, by itself, provides probable cause. "[T]he 'strong' or 'very strong' smell of unburnt marijuana" is insufficient "to provide probable cause to believe that a criminal amount of the drug is present." ***Overmyer***, 469 Mass. at 23. See ***Commonwealth v. Meneide***, 89 Mass. App. Ct. 448, 451 n.4 (2016) ("The smell of unburnt marijuana, standing alone, no longer provides reasonable suspicion," much less" probable cause"). Based on all the factors in this case, there was sufficient evidence in the affidavit to establish probable cause to issue the search warrant.

II. Domestic Violence and Sexual Assault Offenses

- **TRAINING TIP:** This case involves a domestic assault where the victim made statements to police when they arrived on scene. Although most the statements were deemed excited utterances, the Appeals Court also examined if some of the statements were admissible and not a violation of the 6th Amendment.

Excited Utterances

Commonwealth v. Rand, 97 Mass. App. Ct. 758 (2020): The victim and the defendant, Roy Rand had an off-and-on dating relationship for approximately five years. They had a child together and the defendant visited regularly. On July 25, 2015, at approximately 12:45 A.M., the victim called 911 said, "I need somebody to come to my house," and, sobbing, "My boyfriend just beat me up." The dispatcher asked whether the boyfriend was still present and dispatched police. The victim gave the dispatcher the name of the defendant and said he left in a car. The dispatcher announced on the police radio, "Boyfriend's no longer on scene. He fled in an unknown vehicle." The dispatcher asked, "What exactly happened tonight?" The victim stated that her boyfriend had arrived at midnight and that her sister "was causing trouble and stuff like that." According to the victim, the boyfriend told her to remove her sister from the house and she relayed to the dispatcher that the boyfriend punched her in the face. When asked whether she needed an ambulance, the victim said she did not know but her face was swollen. The dispatcher sent an ambulance and asked the victim questions about when the boyfriend left, to which Susan replied, "Like two minutes ago, since I called you guys." The dispatcher continued to ask the victim where she lived. The victim volunteered, "He tried to kill me."

When police arrived on scene, they found the victim on the phone with the dispatcher. The officers found Susan very upset, hysterical, and sobbing uncontrollably. One of the officers testified that he saw swelling on victim's face and he noticed her eyes were bloodshot. Police were permitted to testify what happened next. Sergeant Philip Yee said that the victim identified that the defendant who was her boyfriend had beat her up. He had had punched her several times in the head and choked her with his knee, causing her to lose consciousness, hit the back of her head, and urinate on herself. When she regained consciousness, the defendant again hit her and choked her, this time with his hands. According to the victim, the defendant slapped her face two or three times. Officer Joseph Connolly testified as well and repeated the victim's statements that the defendant had beat her up. There were photographs of the victim's injuries which showed she had broken blood vessels in her eye. The injuries were consistent with strangulation rather than intoxication. At the hospital, she had urine on her pants and was hoarse. Incontinence, hoarseness, and lost consciousness are additional signs of a person having been strangled.

Conclusion: The Appeals Court held that the testimonial statements which were admitted at trial went to the heart of the case and therefore the defendant's convictions are set aside.

The Appeals Court had to determine whether the admission of the victim's statements violated the defendant's confrontation rights. In order to determine if a person's right to confrontation is violated, depends on whether the statements were testimonial or nontestimonial. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Davis v.***

Washington, 547 U.S. 813, 822 (2006). If, however, there is no "ongoing emergency" and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," the statements are testimonial. ***Id***. "Testimonial statements are those made with the primary purpose of 'creating an out-of-court substitute for trial testimony.'" ***Commonwealth v. Imbert***, 479 Mass. 575, 580 (2018). "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause."

Factors that help distinguish testimonial statements from nontestimonial statements include: "(1) whether the [declarant] was speaking about 'events as they were actually happening rather than describing past events'; (2) whether any reasonable listener would recognize that the [declarant] was facing an 'ongoing emergency'; (3) whether what was asked and answered was, viewed objectively, 'necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past,' including whether it was necessary for [police] to know the identity of the alleged perpetrator; and (4) the 'level of formality' of the interview (emphasis in original)." ***Davis***, 547 U.S. at 827. See Mass. G. Evid. Art. VIII, Introductory Note (a) (2019).

In addition, the SJC has repeatedly held that "statements made during a 911 telephone call by an individual who was assaulted only a short time earlier and is seeking emergency police or medical assistance are not testimonial, even when some of those statements (including those that identify the perpetrator) are the result of questions by an agent of law enforcement who is attempting to resolve the emergency." ***Commonwealth v. Rodriguez***, 90 Mass. App. Ct. 315, 323 (2016). However, where a 911 call delves into past events or the declarant's statements are not made for the purpose of resolving an ongoing emergency, the statements are testimonial. See ***Beatrice***, 460 Mass. at 259-26

Here, the statements made during the 911 call to assess and respond to the emergency in this case were nontestimonial and admissible. Accordingly, the following statements were admissible: "I need somebody to come to my house," "My boyfriend just beat me up," and the defendant's name. Statements made in response to the dispatcher's asking, "What exactly happened tonight?" were testimonial. They were designed to elicit past events and are not covered by the emergency exception and should not have been admitted. The victim's statements that her boyfriend beat her up and tried to kill her are not admissible because they were not relevant to resolving the emergency that was at hand. Lastly, the victim's statements that she made to police when they arrived on scene are inadmissible because there was not an ongoing medical emergency. The Appeals Court commented that the ***Beatrice*** case constrained its holding because in that case, the victim had "'just' been severely beaten by her boyfriend but there was no suggestion that her injuries were serious or life threatening." 460 Mass. at 260. In the present case, the victim's injuries did not appear serious or life threatening since she was able to explain what had happened.

A single message from an Instagram Account was insufficient to establish a violation of an abuse prevention order!

Commonwealth v. McMann, 97 Mass. App. Ct. 558 (2020): After dating the defendant for five months, the victim obtained an abuse prevention order against him. The order prohibited the defendant from contacting the victim "in writing, electronically or otherwise, either directly or through someone else. While the order was in effect, the victim received an Instagram message from the username "bigm617." The message said simply, "Yoooo." The victim testified that she knew "bigm617" was the defendant's username

because the associated account displayed pictures of the defendant, including one of him with the victim, and the victim and the defendant had previously "liked" and commented on each other's Instagram posts. The victim went to the police station and showed the Instagram message to an officer. Later that night the defendant met with the same officer and denied sending any message to the victim. According to the officer, the defendant "wanted to show me that he never did" and entered a passcode to unlock his cell phone. He then opened the Instagram application on his cell phone, and the "Yoooo" message to the victim appeared on the screen. The officer observed that the defendant looked "surprised."

Conclusion: The Appeals Court held that there was insufficient evidence to prove the defendant violated the restraining order by sending Instagram messages to the victim.

Evidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant." ***Commonwealth v. Purdy***, 459 Mass. 442, 450 (2011). Rather, there must be additional circumstantial evidence of the source of the communication, such as evidence regarding the security of the account. See ***Id*** at 450-451 ("e-mails were authenticated as having been authored by the defendant" where they "originated from an account bearing the defendant's name and acknowledged to be used by the defendant" and "were found on the hard drive of the computer that the defendant acknowledged he owned, and to which he supplied all necessary passwords"). Other circumstantial evidence may include "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item." Mass. G. Evid. § 901(b)(4) (2019). See ***Purdy***, supra at 447-448.

In ***Williams***, the Commonwealth authenticated messages sent from a "MySpace" account that the recipient of the messages identified as belonging to the defendant's brother. Although the account bore a picture of the defendant's brother, and the messages themselves displayed some familiarity with the recipient, ***id.*** at 868, the SJC held that it was insufficient to prove the that the messages were sent by the defendant. ***Commonwealth v. Williams***, 456 Mass. 857 (2010). There was no testimony about "how secure such a Web page is, who can access a My Space Web page or whether codes are needed for such access." ***Id***.

Here, the Commonwealth failed prove that the defendant was the person who wrote or sent the message to the victim. Although the evidence was sufficient to show that the Instagram account was the defendant's and that he could access it, there was no circumstantial evidence establishing authorship. Nothing about the content or tone of the message, "Yoooo," corroborated that the defendant wrote it. The message did not refer to any prior conversation between the parties or contain other distinctive characteristics. ***Oppenheim***, 86 Mass. App. Ct. at 368 (evidence sufficient to authenticate that defendant wrote instant message, where tone was familiar to recipient, and message referred to earlier discussions with recipient and personal details about defendant). The evidence did not even show that the defendant previously sent the victim messages through Instagram.

Furthermore, as in ***Williams***, 456 Mass. at 869, the evidence did not establish any limitations on who could access the defendant's Instagram account. There was no evidence that users generally, or the defendant specifically, must enter a password to access Instagram. Although the Commonwealth cites the fact that the defendant needed a passcode to open his cell phone, this does not tip the scale in favor because there was no evidence that a cell phone is the only, or even primary, means of accessing an Instagram account. Instagram accounts can be accessed from multiple devices, such as tablets and desktop computers. Thus, that the message appeared when the defendant opened the Instagram application is not

proof that he used his cell phone to send it. The Commonwealth conceded as much at oral argument. The Commonwealth failed to meet its burden either through evidence that the message itself contained characteristics showing that the defendant wrote it, or through evidence establishing how secure Instagram accounts are and how the Instagram cell phone application works. The defendant's motion for a required finding of not guilty should therefore have been allowed."

Indecent Assault and Battery

Commonwealth v. Benedito, 95 Mass. App. Ct. 548 (2019): The defendant kissed his girlfriend's sister while she was sleeping. After the incident, the victim awoke and screamed for her sister's help. The defendant was unclothed at the time and argues that there was insufficient evidence to convict him of indecent assault and battery.

"To prove indecent assault and battery on a person ae fourteen or older, the Commonwealth is required to establish that the defendant committed 'an intentional, unprivileged, and indecent touching of the victim.'" ***Commonwealth v. LaBrie***, 473 Mass.754 (2016). Conduct is "indecent" when it is "fundamentally offensive to contemporary moral values which the commonsense of society would regard as immodest, immoral, and improper." ***Commonwealth v. Mosby***, 30 Mass. App. Ct. 181 (1991). The entire context of the offensive touching must be examined. ***Commonwealth v. Castillo***, 55 Mass. App. Ct. 563,565 (2002). "The test for indecency is objective, turning on the nature of the conduct rather than the defendant's intent." ***Cruz, supra***. The defendant argues because there was no forced insertion of his tongue inside the victim's mouth, it did meet the definition of indecent. However, the facts suggest the defendant surreptitiously kissed the victim while he was unclothed and she was asleep. When she asked why he kissed her, his response was that could not help himself. See ***Commonwealth v. Colon***, 93 Mass. App. Ct. 560, (2018). Under certain circumstances, touching of the mouth, even without insertion of the tongue, may be considered an indecent act. See ***Commonwealth v. Vazquez***, 65 Mass. App. Ct.305, 307 (2005). The defendant kissed the victim on the mouth while she was sleeping, unable to consent and he was naked. Kissing the defendant on the mouth, which is an intimate part of the body, qualifies as an intimate act. The conviction is affirmed.

The Appeals Court holds that age must not be proven beyond a reasonable doubt to sustain a conviction for indecent assault and battery.

Commonwealth v. Dobbins, 96 Mass. App. Ct. 593 (2019): The defendant appealed and argued that his convictions of indecent assault and battery should be reversed because the evidence was insufficient to establish that the victim was fourteen years of age or older at the time of the assaults.

Conclusion: The Appeals Court held that proof that the victim "has attained age fourteen" is not required to sustain a conviction of indecent assault and battery under G. L. c. 265, § 13H, so any failure of proof in that regard is not a basis to reverse the defendant's convictions. Although there more enhanced penalties for a person who is convicted on indecent assault and battery on a child under age 14, the Appeals Court determined that the language in the statute that states "on a person who has attained age fourteen" in § 13H was intended to differentiate that crime from the crime of indecent assault and battery on a child under age fourteen. It was not intended to create an element that the Commonwealth must prove beyond a reasonable doubt.

Child Pornography

Commonwealth v. Graziano, 96 Mass. App. Ct. 601 (2020): A computer technician discovered two (2) images of a girl wearing lingerie while he was trying to remove a virus from the defendant's computer. In one of the images, the fabric of the lingerie is sheer enough to expose the girl's breasts to view. Based on the images, the defendant was charged with possessing child pornography in violation of G. L. c. 272, § 29C (§ 29C). On appeal, the defendant contends that since the girl is wearing lingerie over her breasts, she is not deemed unclothed according to the statute.

The primary issue is under G. L. c. 272, § 29C (vii), what qualifies as unclothed in the statute. The obvious intent of G. L. c. 272, § 29C (vii) in particular is to protect children from having their naked private body parts exhibited in a lewd manner. In this context, we conclude that the Legislature intended that whether a relevant body part should be considered covered and hence 'clothed' should turn on the extent to which that body part can be seen. The Appeals Court found that where a child is depicted wearing clothing that allows a viewer to see the listed body parts to an extent comparable to the child's being naked, a jury may deem the body parts 'unclothed.' Here, it is reasonable that at least one of the images met that standard, and the defendant's challenge to the sufficiency of the evidence therefore fails.

Differences between c.209A and 258 E Orders

	)rders Restraining Orders	**258 E Orders**
Definition	**Suffering abuse:** ➢ Causing physical harm ➢ Or placing another in fear of imminent serious physical harm ➢ Or causing another to engage involuntarily in sexual relations by threat, force or duress **Includes Family or Household Members** ➢ Who are married or living together ➢ Related by blood or marriage ➢ Have a child together regardless of living arrangement ➢ Dating or engaged	**Harassment: 3 or More Acts** 1) Aimed a specific person 2)Was willful and malicious 3) Intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion; 4) Conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim; 5) Or one act that by force thereat or duress causes another to involuntarily engage in sexual relations 6)Or one act that constitutes one of crime of sexual assault, harassment and stalking
Jurisdiction	Family, Probate, District Courts, BMC and Superior Courts (except for dating relationships)	District Courts, Superior Court, BMC and Juvenile Court if both parties under 17 years old
Venue	Plaintiff's residence Plaintiff's former residence left to avoid abuse	Plaintiff's residence
Timeliness	time constraints as when to file the order	No time constraints as when to file the order
Relief	No abuse the plaintiff No contact the plaintiff Vacate plaintiff's household, multiple family dwelling and workplace Pay restitution Temporary custody of minor child Surrender firearms, gun licenses and FID cards	Court can issue order that the (a) defendant refrain from abusing or harassing the plaintiff, (b) no contact with plaintiff, (c) remaining away from plaintiff's home or workplace and (d) pay restitution directly related to losses. **No Surrender of Firearms or FID Card**

Reckless Endangerment

Failure to supervise a two-year old daughter, both inside and outside the home did not qualify as reckless endangerment.

Commonwealth v. Costa, 97 Mass. App. Ct. 447 (2020): On September 1, 2017, Sergeant Ryan Maltais of the Lakeville Police Department, responded to an incident where the fire department was assessing a two (2) year-old daughter at a residence. The defendant, John Costa explained that he and the daughter's mother were in their yard while their daughter "was playing in his motor vehicle that was parked at the residence." The defendant stated that both parents "observed their daughter spitting something from her mouth onto the driver's seat." The parents determined that their daughter had placed an eight milligram Suboxone tablet in her mouth, ingested half, and spit out the remaining half. The defendant called 911, and the parents went to the fire department.

The defendant told Sergeant Maltais that "he does have Suboxone in the vehicle at times within a pill bottle. He further told Sergeant Maltais that the Suboxone pill bottle was not in the vehicle at the time of the incident. The defendant said he has a prescription for Suboxone at home. The defendant provided the remaining half of the tablet to Sergeant Maltais. The defendant was charged with one count of reckless endangerment.

Conclusion: The Appeals Court held that there was no probable cause to believe that the defendant "wantonly or recklessly engaged in conduct that created a substantial risk of serious bodily injury to a child," as required by the reckless endangerment statute, G. L. c. 265, § 13L.

According to § 13L, a "substantial and unjustifiable risk" requires "a good deal more than a possibility." ***Commonwealth v. Hendricks***, 452 Mass. 97, 103 (2008). In addition to disregard of this risk, there needs to be a showing that is 'substantially more than negligence.'" ***Coggeshall***, 473 Mass. at 668. Further, "wanton and reckless" conduct under § 13L is limited "to circumstances where an accused 'is aware of and consciously disregards' the risk." G. L. c. 265, § 13L. Thus, "§ 13L requires proof of the defendant's subjective state of mind with respect to the risk involved. That is, he must be shown to have been actually aware of the risk." See ***Coggeshall.*** The Appeals Court examined the totality of the circumstances and found that in the context of reckless endangerment case alleging inadequate supervision, "relevant circumstances may include 'the gravity and character of the possible risks of harm; the degree of accessibility of the [defendant]; the length of time of the abandonment; the age and maturity of the children; the protective measures, if any, taken by the [defendant]; and any other circumstance that would inform the factfinder on the question whether the defendant's conduct was [wanton or reckless].'" ***Barnes v. Commonwealth***, 47 Va. App. 105, 113 (2005).

Here, the Commonwealth argues that the complaint established probable cause for the elements of reckless endangerment because "the defendant allowed his two-year old daughter to play in his motor vehicle unsupervised, a motor vehicle in which he routinely stored narcotics." The Commonwealth's argument relies upon speculation rather than reasonable inferences. Contrary to the Commonwealth's position, the police report did not show, that the daughter was unsupervised. Rather, the information revealed only that the defendant was in his yard while his daughter was in his motor vehicle parked at the same residence. He and the daughter's mother contemporaneously observed their daughter spit something out of her mouth, and reacted by retrieving the item, calling 911, and taking her to the fire station. There was no information to the effect that the defendant was anywhere but adjacent to the motor vehicle where he and the daughter's mother could, and did, observe their daughter. ***Santos***, 94 Mass. App. Ct. at 561

(defendant's act of leaving child in front of television while defendant used bathroom did not rise to level of wanton or reckless conduct creating substantial risk of bodily injury to child even though child had previously wandered from home).

The Commonwealth contends "that the act of leaving a two-year old alone in a vehicle is in itself reckless" because a child "could have potentially put a car into gear and rolled the vehicle," and "leaving a child alone in a vehicle where narcotics are routinely stored is even more egregious." The Commonwealth reasons that the daughter "could have injured herself in any number of ways. She could have manipulated a device inside the vehicle, such as putting the car into gear. She could have wandered out into vehicular traffic." The police report states only that the daughter was inside the vehicle; that at some unidentified "times" the defendant's prescription medication, in a bottle, had been in the vehicle; and that her parents were close enough to observe her "spitting something from her mouth," retrieved the object, called 911, and sought immediate emergency care. The police report does not reflect, and does not permit an inference, that the defendant lacked "accessibility" to his daughter at any time, or "abandon[ed]" his daughter for any length of time, if at all. ***Santos***, 94 Mass. App. Ct. at 561. Furthermore, the police report does not offer any other facts relevant to the question whether the defendant consciously disregarded a substantial and unjustifiable risk, such as whether the daughter was in any sort of car seat; whether she wore a seatbelt or restraint; whether any windows or doors to the vehicle were open or closed; whether the motor was running; or whether the keys were in the ignition. Thus, stripped of speculative assertions, the application for complaint permits, at most, an inference that the defendant might have unknowingly exposed his daughter to the theoretical possibility of an injury. See ***Coggeshall***, 473 Mass. at 670 ("wanton or reckless" conduct under § 13L limited "to circumstances where an accused 'is aware of and consciously disregards' the risk" [citation omitted]); ***Hendricks***, 452 Mass. at 103 ("the risk must be a good deal more than a possibility"). This is not enough to establish probable cause for reckless endangerment.

Failure to supervise a three-year old daughter as she wandered outside of the home qualified as reckless endangerment.

Commonwealth v. Santos, 94 Mass. App. Ct. 558 (2018): On May 13, 2016, Saugus police Officer Jeffrey Wood was dispatched to an elementary school after receiving a report that a child was wandering alone in the playground. Officer Wood learned the child was only three years old and recalled finding the same child alone in the playground almost a month ago. When Officer Wood arrived at the school around 10:55 A.M., he went to the nurse's office and saw the child was wearing a T-shirt and diaper and had bare feet. The little girl had no injuries and the school employee relayed that she found the child in the playground around 10:40 A.M. Another officer located the child's mother who lived approximately 1000 feet from the playground. The mother did not respond immediately because she was asleep. When asked if she knew where her daughter was? She replied, "At the playground?" The defendant explained that she had set the child down in the living room to watch cartoons while she went to the upstairs bathroom for approximately ten to fifteen minutes. "When she came back downstairs, the child was gone. The apartment door was open ad the key to the deadbolt had been inserted from the inside. The defendant said that she looked for the child for approximately ten minutes and "just assumed she was playing with a neighbor's child." When asked why she did not call 911, the defendant replied, "That was my mistake." The police reunited the child with the defendant and the father arrived as well. The Department of Children and Family Services was called.

Conclusion: The Appeals Court held that there was probable cause to establish that the defendant recklessly endangered her child.

The crime of reckless endangerment of a child requires proof that the defendant "wantonly or recklessly

engage[d] in conduct that create[d] a substantial risk of serious bodily injury or sexual abuse to a child [under the age of eighteen] or wantonly or recklessly failed to take reasonable steps to alleviate such risk where there [was] a duty to act." G.L. c. 265, § 13L. "Wanton or reckless behavior occurs," for purposes of § 13L,"when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child." ***Id***. See ***Commonwealth v. Coggeshall***, 473 Mass. 665, 670 (2016). To be substantial and unjustifiable, "the risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." G. L. c. 265, § 13L. "In other words, the risk must be a good deal more than a possibility, and its disregard substantially more than negligence." See ***Coggeshall,*** 473 Mass. at 668. "The risk also must be considered in conjunction with a particular degree of harm, namely 'serious bodily injury,'" ***Coggeshall***, 473 Mass. at 668, defined as an injury that "results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death." G.L. c. 265, § 13L.

While no reported Massachusetts decision has addressed whether, and in what circumstances, a caregiver's inadequate supervision of a child can support a conviction under § 13L. Relevant circumstances may include "the gravity and character of the possible risks of harm; the degree of accessibility of the [defendant]; the length of time of the abandonment; the age and maturity of the children; the protective measures, if any, taken by the [defendant]; and any other circumstance that would inform the factfinder on the question whether the defendant's conduct was [wanton or reckless]." ***Barnes v. Commonwealth,*** 47 Va. App. 105, 113 (Va. Ct. App. 2005). Considering the totality of the circumstances here, the Appeals Court concluded that the complaint established probable cause to believe that the defendant violated §13L. Leaving the child alone in front of a television while a parent uses the bathroom does not qualify as reckless endangerment. However, when the defendant discovered her child was missing and failed to look for her or contact police, it changed the scope. There was no indication that the child knew how to open the deadbolt or had done so before. The Appeals Court held that the defendant's failure to look for her three year old child a left unattended outdoors faces serious risks of harm --she could have "wandered out into vehicular traffic, or gotten lost outside, or injured [herself] in any number of ways that children of such a young age can." ***Barnes***, 47 Va. App. At 112. Given these dangers"[i]t cannot seriously be disputed that a parent's duty to protect her young child requires keeping the child from wandering around outside unsupervised." ***Greenlee***, 2012-Ohio-1432, ¶14.

The relevant issue, is not how much time passed before the child was found; it is whether there is a substantial risk that the defendant's "acts, or omissions where there is a duty to act, would result in serious bodily injury to the child." G.L. c. 265, § 13L. The act or omission here is not leaving the child unsupervised outside for five minutes. Rather, the act or omission that gives rise to probable cause is the defendant's decision to leave a three-year-old child unsupervised outside for an indeterminate amount of time, without calling the police and with no apparent plan to continue searching on her own any time soon. See ***Greenlee***, 2012-Ohio-1432, ("if the child manages to escape the parent's supervision, whether or not this is the parent's fault, the duty of protection demands that the parent make an effort to find the child as quickly as possible"). That the child was timely and fortuitously found by a responsible adult does not bear on the defendant's culpability, at least not without evidence that the defendant knew that child had been found and was in a safe place. See ***Barnes***, 47 Va. App. at 111-112 (evidence sufficient to prove that defendant acted with "gross indifference to her children's safety," even though "children exercised the good sense to walk to a neighbor's apartment"); ***Riggs,*** 2 S.W.3d at 873 ("Whether the outcome of the incident had been the child's death, his rescue or his return home, a charge of child endangerment could have been filed and the question would remain the same.")

III. Firearms and New Trends

License to Carry in Massachusetts

The Appeals Court holds that the Commonwealth must prove a defendant knew a firearm was loaded in order to sustain a conviction under G.L. c. 269 §10(n)!

- **NOTE:** The SJC heard has reaffirmed that pursuant to G.L. c. 269, § 10(n), evidence must prove that a defendant knew a firearm was loaded!

Commonwealth v. Tyriek Brown, 479 Mass. 600 (2018): The SJC examined the language of subsections (a) and (n) of G. L. c. 269, § 10, to determine whether the Commonwealth had to prove that the defendant knew the firearm was loaded. When reading G. L. c. 269, § 10(a), it is irrelevant whether the firearm was "loaded or unloaded," in order to trigger a violation. However, pursuant to G. L. c. 269, § 10(n), if the firearm that was knowingly and unlawfully possessed was loaded, then the defendant is subject to additional jail time. The SJC found that to be convicted of unlawful possession of a loaded firearm, a defendant must know that the firearm he possessed was loaded.

The facts of this case suggest that there was insufficient evidence to prove the defendant knew the firearm was loaded**.** Although the SJC has stated that "where the firearm was a revolver located in a vehicle, a rational jury could infer that those who possessed the firearm knew that it was loaded with ammunition." ***Commonwealth v. Jefferson***, *supra*. However, the statement was made with respect to a revolver, a type of handgun that one might be able to tell was loaded merely by looking at the outside of the gun (because some of the bullets might be visible in the cylinder). The handgun in this case was a pistol that relied on a magazine to feed bullets into the gun. As a result, it would be difficult for a person to discern whether the gun was loaded merely by looking at it. There was no basis where a rational juror could conclude beyond a reasonable doubt that the defendant knew the gun was loaded. The defendant therefore was entitled to a judgment of acquittal on the indictment that alleged unlawful possession of a loaded firearm.

- **TRAINING TIP*:*** Although there was insufficient evidence to prove the defendant knew the firearm he had in his possession was loaded, this case serves as a good review of the safety concerns that arise during motor vehicle stops and it highlights when protective sweeps of the motor vehicle are justified.

Commonwealth v. Grayson, 96 Mass. App. Ct. 748 (2019): One evening in July 2018, Boston Police detectives were in Dorchester looking for a young man whom they had an arrest warrant. The detectives spotted the man on a bicycle, accompanied by the defendant, Deshawn Grayson. The defendant was also on a bicycle. When detectives approached the men on their bicycles, they arrested the man whom they had a warrant. The defendant attempted to flee on bicycle, steering with one hand while clutching his waistband with the other. Based on detective's training about the characteristics of armed persons, his observations of the defendant alerted him that he may have a firearm.

The defendant tried to turn onto a side street steering with only one hand but lost control and fell off his bicycle. As the defendant fell, he kept one hand on his waistband. The defendant began running away with the detective following. The defendant broke a fence while trying to scale it. The detective stopped the pursuit when he encountered a large dog. Police in the area were notified to establish a parameter around to ensure that no one could leave the back yards without being observed. Within ten minutes, police

found a knotted sock at the base of a fence and a pair of shoes and they located the defendant hiding behind rock. The defendant was not wearing any shoes. He was arrested and frisked; no contraband was found. A semiautomatic pistol loaded with a magazine capable of holding eight rounds of ammunition and containing seven was found inside the sock. No usable fingerprints were found on any of the items. A firearms examiner testified that it would difficult to know if the pistol was loaded simply by looking at it. The defendant was charged and convicted of carrying a loaded firearm without a license, G. L. c. 269, § 10 (n), carrying a firearm without a license and of trespassing. See G. L. c. 269, § 10 (a); G. L. c. 266, § 120. The defendant filed an appeal challenging his convictions.

Conclusion: The Appeals Court affirmed the convictions for carrying a firearm without a license and trespassing. The conviction for carrying a loaded firearm was reversed because there was insufficient evidence.

1st Issue: Was there sufficient evidence to establish that the defendant possessed a firearm?

Based on the facts, the Appeals Court concluded that there was sufficient evidence to prove the defendant possessed the firearm. The defendant fled the police, clutching an item in his waistband. The detectives testified that the manner in which the defendant carried the firearm was characteristic of persons carrying firearms. Clearly, the item was important to the defendant because he continued to hold his waist while steering (and falling off) his bicycle and even climbing over (and breaking) the fence. Later that police found the firearm on the ground next to a fence in the area where the defendant was fleeing. Additionally, the police found shoes next to the fence and when they located the defendant he was not wearing nay shoes. The defendant's attempt to hide from police and his unprovoked flight allow for the reasonable inference of consciousness of guilt. There was also no other contraband or person in the area which would have justified flight. All of these factors, suggest that the defendant knowingly possessed the firearm. ***Commonwealth v. Dyette***, 87 Mass. App. Ct. 548 (2015)

2nd Issue: Was there sufficient evidence to establish that the defendant knew the firearm was loaded.

Pursuant to G. L. c. 269, § 10 (n), the Commonwealth must prove that a defendant knew the firearm he or she possessed was loaded." ***Commonwealth v. Brown***, 479 Mass. 600, 601 (2018). In ***Brown***, "it was not possible to discern merely by observation whether the pistol was loaded; the magazine was inserted inside the handle and was not visible." ***Id***. at 608. Absent any other evidence that the defendant knew the firearm was loaded, the court held the evidence insufficient. Id. at 609. See ***Commonwealth v. Galarza***, 93 Mass. App. Ct. 740, 748 (2018) (same).

More recently, in ***Resende*** the defendant was found with the firearm in his waistband. A commonsense inference from that fact alone is that a person would check to see if the firearm was loaded before putting it in his waistband. This rational inference is strengthened by the defendant's admission that he had some familiarity with firearms and was alone in the nighttime. Finally, in ***Resende***, it would be reasonable to infer that the defendant had been threatening someone and made reference to a firearm before police arrived. In ***Resende***, the court thought all of these factors support the inference that the defendant was aware that the firearm found in his waistband was loaded."

Although it was a reasonable inference that a person carrying a firearm in his (or her) waistband would know whether it was loaded, the Appeals Court in this case did not rely on that inference alone. Here, the Commonwealth argued that the defendant would have checked to see if a firearm was loaded before putting

it in his waistband." ***Id***. at 200. The Appeals Court was not persuaded by this argument and found that there were additional factors missing. First, there was no evidence that the defendant was familiar with firearms, or that he carried the pistol while alone in the nighttime, or that he had threatened anyone and mentioned a firearm. Second, there is no evidence that the pistol had been fired while in the defendant's possession, or that any ammunition was separately recovered from the defendant's person or belongings, or that the pistol's loaded status would have been evident merely by looking at it, or that the defendant made any other statement indicative of knowledge. Third, police found the pistol tied inside a sock, making it harder to draw the inference that the defendant inspected it --i.e., slid open the magazine to check for bullets -- before putting it in his waistband, or that the defendant intended it to be ready for immediate use and thus knew that it was loaded. Even though the Commonwealth argued that the "heft," of loaded firearm would notify the defendant that it was loaded, the Appeals Court did was not persuaded. Lastly, the defendant's action of clutching his waistband, did not mean he knew the firearm was loaded and could accidently discharge. Rather, the Appeals Court implied that clutching a waistband could imply the defendant did not want to drop the pistol at all. None of the facts in this case were sufficient to prove the defendant knew the firearm was loaded.

3rd: Was there sufficient evidence to sustain a conviction for trespassing?

The criminal trespass statute provides that "[w]hoever, without right enters or remains in or upon the improved or enclosed land of another, after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon, shall be punished" G. L. c. 266, § 120. When there is no notice posted, the term "'directly does not require a person having control of unposted premises to be on those premises at all times of the day or night to ward off intruders." Rather, fences or walls and locked gates or doors can forbid entry to the premises. ***Commonwealth v. Scott***, 71 Mass. App. Ct. 596, (2008). Here the defendant climbed over a five- or six-foot wooden fence, breaking it in the process, to enter another back yard. That yard was separated from the next yard by a fence, on the other side where the defendant's sneakers were found. Although there were no posted signs, the fences were not warning to indicate that the owner of the premise forbid entry and therefore the conviction for trespassing is affirmed.

Knowledge the Firearm Was Loaded

Commonwealth v. Cooper, 481 Mass. 1108 (2020): On August 17, 2016, Boston Police received a 911 call that there was an individual who was unconscious and in possession of a firearm near a playground. When officers arrived on scene, they observed the defendant, Randy Cooper, asleep on the platform of playground structure. Police could see the back area and handle of a gun protruding from the defendant's armpit area. The defendant's other arm was across his body but not gripping the gun. The magazine was fully inserted into the gun seized by the police such that no one could know it was loaded from observing it. The defendant was arrested and the defendant revealed during his phone all that he carried a firearm because of the violence in his neighborhood. After a bench trial, the defendant was convicted of carrying a loaded firearm without a license G.L. c. 269 s. 10 (n). The defendant appealed and argued that there was insufficient evidence to prove that the defendant knew the firearm was loaded.

Conclusion: The Appeals Court affirmed the defendant's conviction and held that there was sufficient evidence to prove the defendant knew the firearm was loaded.

In ***Brown***, a gun was found in the rear console of the vehicle and the court held that there was not enough evidence to draw an inference that the defendant knew the firearm was loaded. ***Commonwealth v. Brown***,

479 Mass. 600 (2018). "Knowledge can be inferred from circumstantial evidence." ***Staples v. United States***, 511 U. S. 600 (1994). Similarly, in ***Galarza***, the court held that the defendant's nervousness when speaking to police and his attempts to block the officer's access to the center console were insufficient to prove that the defendant knowingly possessed the firearm. ***Commonwealth v. Galarza***, 93 Mass. App. Ct. 740 (2018).

Here, there is circumstantial evidence to show that the defendant knew the gun was loaded. The defendant was out doors and the gun was neither holstered, nor concealed but was drawn. It is reasonable to infer that one that brings a gun to a location knows whether or not a gun is loaded. ***Commonwealth v. Mitchell***, 95 Mass. App. Ct. 406 (2019). There is a commonsense reference from that fact alone is that person would check to see if the firearm was loaded before putting it in his waistband. ***Commonwealth v. Resende,*** 94 Mass. App. Ct 200. The defendant in this case tucked a gun under his arm in the armpit area and later made statements at the police station that carried a weapon for self-protection. All of these factors support the inference that the defendant knew the firearm was loaded.

Discharging a Firearm

General Laws c. 269, § 12E, provides: "Whoever discharges a firearm as defined in [G. L. c. 140, § 121], a rifle or shotgun within [500] feet of a dwelling or other building in use, except with the consent of the owner or legal occupant thereof, shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both."

Commonwealth v. Kelley, 484 Mass. 53 (2020): In January of 2013, the defendant, Michael Kelly, was in his father's house in Massachusetts although he also lived in Maine. The defendant had a Maine driver's license and he owned a semiautomatic handgun which he kept in a case inside of a hallway closet of his father's Massachusetts house. The defendant's father had a Massachusetts license to carry a firearm but the defendant did not. The defendant met the minimal requirements for possession of a firearm in Maine, where a license to own a firearm is not required.

At some point on January 20, 2013, the defendant took the firearm and brought it into his bedroom. The defendant and one of his friends went into the bedroom, where the defendant demonstrated various features of the firearm. The defendant depressed the trigger in order to disassemble the firearm; this discharged a bullet, which struck the victim in the hand. The defendant was charged with unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (h); possession of a high capacity feeding device, in violation of G. L. 269, § 10 (m); discharging a firearm within 500 feet of a building, in violation of G. L. c. 269, § 12E; assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (b); and two counts of witness intimidation (of the victim and the investigating officer), in violation of G. L. c. 268, § 13B.2 The defendant was convicted of unlawful possession of a firearm, discharging a firearm within 500 feet of a building, and one count of witness intimidation (the investigating officer) and he filed an appeal questioning whether G. L. c. 269, § 12E, contains a requirement that the discharge of the firearm be knowing.

The Court determined that General Laws c. 269, § 12E, does not contain any language specifying a requisite mens rea. Therefore, we must determine whether, in enacting it, the Legislature intended to create a strict liability, public welfare offense. As discussed, public welfare statutes criminalize conduct that has not necessarily caused harm but is "potentially harmful or injurious." See ***Staples***, 511 U.S. at 607. The discharge of a firearm within 500 feet of a building is such conduct. Firearms do not cause harm merely by existing. ***Commonwealth v. Young***, 453 Mass. 707, 714 (2009). Rather, when firearms are discharged,

they create a risk of harm. It is important to note that the statute at issue here only criminalizes discharges within 500 feet of a dwelling or building in use, not within 500 feet of any building. See G. L. c. 269, § 12E. This indicates that the Legislature intended to reduce the risk of injuries to people who might be nearby, a risk that regrettably came to fruition here. The statute is consistent with a public welfare offense because it punishes risky behavior, not behavior that necessarily has caused a harm.

The second factor the SJC considered was whether the defendant took steps to ensure compliance. Here, the undisputed evidence was that the Springfield firearm required the user to depress the trigger in order to disassemble the weapon and that this model of a firearms was not approved for civilian use in Massachusetts. Despite the dangers associated with this particular type of firearm, the defendant stored it in Massachusetts, and he demonstrated its features to the victim inside his father's house. The defendant testified that he handed the firearm to the victim and was not paying attention to the victim for part of the time while the victim was holding the firearm. There were many precautions that the defendant could have taken to avoid the subsequent accidental discharge. All of these factors suggest that the legislature intended this statute to be a strict liability offense. The defendant's convictions are affirmed.

Knowledge that a firearm is operable is not required to sustain a conviction under G. L. c. 276, § 12E

Commonwealth v. Marrero, 459 Mass. 235 (2020): Nathaniel Perez, David Semprit, Vanessa Dubey, and Ricky Alcantara were together in Perez's car. Perez drove the group to a hotel where there was another party underway. Outside the hotel, the group encountered the defendant, who got into the vehicle. At some point after leaving, the defendant took a firearm that belonged to Perez from the vehicle and discharged it twice into the air. Police officers responded to a report of shots fired in the area. No weapon or any projectiles were recovered. Police did find two shell casings imprinted with the characters "9-M-M." An officer testified that the casings were "consistent with shell casings that would be left behind after a piece of ammunition had been fired." Police obtained a surveillance video recording of the intersection where the incident took place. The recording showed a man getting out of a vehicle, raising an object in the air, and two flashes of light emitting from the object. Based on the recording, police interviewed Dubey, Perez, Semprit, and Alcantara. An officer showed Dubey an array of eight photographs, one of which was the defendant. She identified the defendant as "the guy with the gun." Police later interviewed Semprit and showed him the same photographic array. He identified the defendant as the person who had discharged the weapon. Semprit and Perez each testified that the defendant had discharged the weapon. Additionally, the surveillance video recording was introduced in evidence. Dubey identified the man who appeared to discharge a firearm as the defendant. The defendant was convicted the defendant of unlawful possession of a firearm, unlawful possession of a loaded firearm, and discharging a firearm within 500 feet of a building. The defendant appealed from his convictions, and the Appeals Court heard the motion on appeal.

Conclusion: The SJC held that G. L. c. 269, § 10 (a), does not require knowledge that a defendant need not be aware of the physical characteristics that brought a weapon within the statutory definition of a firearm.

1st Issue: Does the charge of discharging a firearm within 500 feet of building under G. L. c. 276, § 12E, have a knowledge requirement?

The defendant contends that G. L. c. 276, § 12E, contains an implied requirement that the discharge be done knowingly. He further argues that, after we infer that the word "knowingly" modifies the element of discharge, we should apply the analysis from ***Cassidy***, 479 Mass. at 534, to require knowledge of all

elements of the statute. The first part of the defendant's argument is foreclosed by our recent decision in ***Commonwealth v. Kelly***, 484 Mass. 53, 54, 66 (2020), in which the SJC held that the statute did not contain a mens rea requirement for the element of discharge. The second part of the defendant's argument relies on the first, and therefore falls with it.

Here, Perez testified that the defendant "had my gun, and he shot it." Semprit testified that the defendant "set off a shot." Surveillance video footage showed the defendant holding an object resembling a firearm in the air, and two flashes of light emitting from it. Two shell casings labelled "9-M-M" were found at the scene, and an officer answered affirmatively when asked whether the casings were "consistent with actual working ammunition." This evidence is substantially similar to that in ***Housewright***, 470 Mass. at 680. There is clearly strong evidence that the weapon was operable. See ***Commonwealth v. Merola***, 405 Mass. 529, 533 (1989) (evidence "need not exclude every reasonable hypothesis of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt"). See also ***Commonwealth v. Gonzalez***, 475 Mass. 396, 407 (2016) ("Proof of an essential element of a crime may be based on reasonable inferences drawn from the evidence, but it may not be based on conjecture"). Here, there was sufficient evidence that the weapon met the statutory definition of a firearm and that the knowledge requirement is not mandated.

2nd Issue: Photographic array. The defendant argues that the Superior Court judge who heard his pretrial motion to suppress the out-of-court identifications made by Dubey and Semprit (motion judge) erred in denying the motion. "[T]he defendant must show by a preponderance of the evidence that, in light of the totality of the circumstances, the procedures employed were so unnecessarily suggestive and conducive to irreparable misidentification as to deny the defendant due process of law." ***Commonwealth v. Cavitt***, 460 Mass. 617, 632 (2011).

The motion judge found that the eight photographs showed men of the same eye color, race, and hair color, with similar facial hair and similar facial features; two of the men had slightly higher hairlines. In the photographs, four men wore white shirts, one had a black shirt, and two were shirtless. The defendant was the only individual wearing a red shirt. The officers who administered the photographic arrays knew that the defendant was a suspect. The judge concluded that the photographic arrays were not impermissibly suggestive. The defendant argues that because he was the only person wearing a red shirt, the identification procedures were inherently suggestive. See ***Commonwealth v. Thornley***, 406 Mass. 96, 100 (1989) ("we disapprove of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristic" [citation omitted]). The man who discharged the firearm, however, was not described as wearing a red shirt. Indeed, a witness testified that he might have been shirtless. Therefore, any suggestibility created by the red shirt was minimal. See ***Arzola,*** 470 Mass. at 813 (array was not impermissibly suggestive despite fact that perpetrator wore gray shirt and defendant's photograph was only one shown wearing gray shirt). Contrast ***Thornley***, supra at 100-101 (fact that only photograph in array with individual wearing glasses was defendant's photograph was impermissibly suggestive because eyewitnesses relied on glasses in making identification). The defendant also argues that the identification was tainted because the administering officers knew his identity and that he was a suspect. "[I]t is the better practice to have an identification procedure administered by a law enforcement officer who does not know the identity of a suspect." ***Commonwealth v. Watson***, 455 Mass. 246, 253 (2009). The absence of such a procedure, however, does not mean that the identification was inevitably impermissible. See ***id.***, citing ***Commonwealth v. Silva–Santiago***, 453 Mass. 782, 797 (2009). Importantly, the motion judge found that the witnesses knew the defendant prior to the incident. This familiarity outweighed any suggestiveness created by the officers' knowledge of the defendant's identity. See ***Commonwealth v. Thomas***, 476 Mass. 451, 461 (2017).

Firearms Chart

Firearms Violations		
M.G.L. c. 269, § 10(a) (non-large capacity firearms, rifles, shotguns and stun guns)	**Possessing* or in a vehicle a non-large capacity firearm (handgun), rifle, or shotgun without a License to Carry (required for handgun or stun gun) or an FID card (required for rifle or shotgun).** ***§ 10(a) does not apply to defendant's home or place of business."**	**☐ Mandatory minimum** **☐ Mandatory minimum 18-month jail sentence.** **☐ Applies to both handguns and long guns.**
M.G.L. c. 269, § 10(m) (large capacity firearms, rifles, shotguns, and feeding devices)	**Possessing anywhere a large capacity firearm (handgun), rifle, or shotgun; or a large capacity feeding device manufactured before 09/13/1994; without a License to Carry Firearms.**	**☐ Felony** **☐ Mandatory minimum 18-month jail sentence.** **☐ FID card exempts offender from 18-mo. mandatory minimum jail sentence.** **☐ Exemption for LEO**
M.G.L. c. 140, § 131M (assault weapons and illegally possessed large capacity feeding devices)	**Possessing, selling, offering to sell, or transferring an assault weapon as defined in G.L. c. 140, § 121, or a large capacity feeding device, manufactured after 09/13/1994 under any circumstances.**	**☐ Felony** **☐ Exemption for LEO**
M.G.L. c. 269, § 10(c) (machine guns and sawed off shotguns)	**Possessing a machine gun without a machine gun license; or a sawed-off shotgun under any circumstances.**	**☐ Felony** **☐ Life in state prison**

M.G.L. c. 269, § 10(h)(1) (non-large capacity firearms, rifles, shotguns,	**Possessing non-large capacity firearms, rifles, shotguns or ammunition in one's house or place of business without an FID**	**☐ Misdemeanor** **☐ Right of arrest**
M.G.L. c. 269, § 10(n) (enhanced penalty for illegally possessing or carrying a loaded weapon)	**Violation of § 10(a) or § 10(c) with a loaded firearm, rifle, shotgun, machine gun, or sawed-off shotgun.**	**☐ "Loaded" means the ammunition is contained in the weapon or within an attached feeding device.** **☐ Must prove the defendant knew the weapon was loaded.** **☐ Cannot charge both § 10(h)(1) and § 10(n) because duplicative.**
M.G.L. c. 269, § 10G [Armed Career Criminal Act sentence enhancement for violations of § 10(a), (c) or (h)]	**(a): Previously convicted of one violent crime or one serious drug offense;** **(b): Previously convicted of two violent crimes, or two serious drug offenses, or one violent crime and one serious drug offense, arising from separate incidences;** **(c): Previously convicted of three violent crimes, or three serious drug offenses, or any combination thereof totaling three, arising**	**☐ State prison for not less than 3 nor more than 15 yrs.** **☐ State prison for not less than 10 nor more than 15 yrs.** **☐ State prison for not less than 15 nor more than 20 yrs.**
M.G.L. c. 269, § 10H (carrying a handgun while Intoxicated)	**Lawfully carrying a loaded firearm (handgun) while under the influence of alcohol or marijuana, narcotic drugs, depressants or stimulants.**	**☐ Misdemeanor** **☐ No statutory right of arrest** **☐ If the person is** **If the person is carrying illegally while Intoxicated charge § 10(a) only.**

M.G.L. c. 269, § 10(b) (dangerous weapons)	**Carrying a dangerous weapon on one's person or under one's control in a vehicle. [See G.L. c. 269, § 10(b) for an extensive list of knives, wooden weapons, brass knuckles, etc.]**	☐ **Felony**